

FILED FOR RECORD

Cause No.: D-16-05-0545-CV

Ector County - 358th District Court

Ector County, Texas

6/16/2017 2:03:09 PM

Clarissa Webster

District Clerk

By: Natalie Guthrie, Deputy

NO. D-16-05-0545-CV

WILLIAM NEWBROUGH	§	IN THE DISTRICT COURT
	§	
VS.	§	358TH JUDICIAL DISTRICT
	§	
ANCHOR RISK MANAGEMENT	§	
CENTRAL FREIGHT LINES, INC.	§	
SMOKER'S OUTLET, INC. AND	§	
REPUBLIC UNDERWRITERS	§	
INSURANCE COMPANY	§	ECTOR COUNTY, TEXAS

PLAINTIFF'S FOURTH AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES PLAINTIFF, WILLIAM NEWBROUGH, complaining of ANCHOR RISK MANAGEMENT, CENTRAL FREIGHT LINES, INC., SMOKER'S OUTLET, INC., and REPUBLIC UNDERWRITERS INSURANCE COMPANY, DEFENDANTS, and for cause of action would show:

I.

Claims for Relief

Pursuant to Rule 47, Tex. R. Civ. P., this suit is within the jurisdictional limits of this court, and Plaintiff seeks monetary relief between \$100,000 and \$200,000.

II.

Parties

Plaintiff is a resident of Ector County, Texas.

Defendant, ANCHOR RISK MANAGEMENT, has answered and no further service is necessary.

Defendant CENTRAL FREIGHT LINES, INC. has answered and no further service is necessary.

Defendant SMOKER'S OUTLET INC., is a Texas Corporation and has appeared herein and no further service is necessary at this time.

Defendant REPUBLIC UNDERWRITERS INSURANCE COMPANY is doing business in Texas and has appeared herein and no further service is necessary at this time.

III.

This case was originally filed as a Level II case but is now governed by a Level III docket control order.

IV.

Venue is proper in Ector County, Texas as the majority of the events surrounding and giving rise to the incident made the basis of this suit occurred in Ector County.

LIST OF EXHIBITS ATTACHED (RULE 59)

1. Copy of Central Complaint filed in Federal District Court Dallas Division Central Freight Lines Inc,(as fiduciary of the Central Freight Lines, Inc. Health Care Plan) vs. Danner and Shiflet Cause no. 304-CV-01542.
2. Brenda Harvey affidavit with attachments.
3. Pattern Jury Charge–Fraud Section 105.2.
4. Affidavit of Mark Cevallos with attachments.
5. Subrogation Notice letter from Anchor to Republic dated May 13, 2016, with attachments.
6. Pattern Jury Charge–Failure to Disclose section 105.4.
7. Pattern Jury Charge–Conspiracy section 109.1

8. Central Freight's Counterclaim against Newbrough

V.

Claims Against Central Freight Lines–Non-Subscriber

1. Plaintiff brings this suit to recover damages for personal injuries sustained by Plaintiff in an accident which occurred in Ector County, Texas, on or about June 18, 2015, which was proximately caused by the negligence of the Defendant CENTRAL FREIGHT LINES, INC. Plaintiff, WILLIAM NEWBROUGH, while exercising due care for his own safety was in the course and scope of his employment with Defendant CENTRAL FREIGHT LINES, INC. when he was injured as a result of the negligence of Defendant CENTRAL FREIGHT LINES, INC.
2. Defendant CENTRAL FREIGHT LINES, INC. failed to provide a safe working environment and failed to provide safe equipment for Plaintiff's use, which proximately caused his injuries. At the time and on the occasion in question, Defendant CENTRAL FREIGHT LINES, INC. was negligent of various acts and omissions, which negligence was the proximate cause of the occurrence in question. Defendant CENTRAL FREIGHT LINES, INC. failed to provide a working environment that was safe and free from hazard and failed to provide safe equipment for the use of their employees.
3. As a result of the accident above described, Plaintiff suffered severe personal injuries, causing Plaintiff to incur reasonable and necessary medical expenses, physical pain and mental anguish, disfigurement, impairment, all in the past, and in reasonable probability, will continue to suffer same in the future by reason of the nature and severity of the Plaintiff's injuries, as a result of Defendant's negligence for which Plaintiff sues.

VI.

Claims against Anchor and Central--Declaratory Judgment

1. Prior to this suit, Plaintiff made claims against SMOKER'S OUTLET, INC. for his injuries arising from the above described incident.

On May 13, 2016 the Plaintiff and Defendant, by and through their respective representatives, settled claims that NEWBROUGH had against Defendant SMOKER'S OUTLET, INC. arising from the incident described above wherein he was injured on June 18, 2015.
2. NEWBROUGH, who had never been apprised of any subrogation interest by any party, settled the claims against SMOKER'S OUTLET, INC. and at SMOKER'S OUTLET INC.'s request, NEWBROUGH indemnified SMOKER'S OUTLET INC. for any subrogation interests which may exist. This agreement was reached on May 13, 2016.
3. On May 20, 2016 NEWBROUGH executed and returned to SMOKER'S OUTLET INC. a written release of claims in exchange for \$35,000.
4. On May 24, 2016 NEWBROUGH was made aware for the first time that ANCHOR RISK MANAGEMENT was asserting a subrogation interest. This date was after both the agreement was made and the release was returned.
5. Defendant ANCHOR RISK MANAGEMENT interfered with the settlement agreement by, after the agreement had been made, improperly asserting a subrogation interest in the settlement agreement which it has waived by its course of conduct.
6. Defendant ANCHOR RISK MANAGEMENT further conspired with Defendant REPUBLIC

UNDERWRITERS INSURANCE COMPANY to misrepresent their alleged subrogation interest as being a statutory workers' compensation lien. Defendant further conspired with Defendant REPUBLIC UNDERWRITERS INSURANCE COMPANY to conceal the existence of their alleged subrogation interest until after the settlement between SMOKER'S OUTLET and NEWBROUGH. Defendant ANCHOR RISK MANAGEMENT conspired to commit common law fraud as well as insurance fraud pursuant to §541, Tex. Ins. Code, as alleged further herein.

7. NEWBROUGH further sues ANCHOR RISK MANAGEMENT and Central pursuant to the Texas Declaratory Judgments Act for a declaration that it has no subrogation interest in the settlement agreement between NEWBROUGH and SMOKER'S OUTLET, INC. which arises from the conduct alleged herein and attached to this petition pursuant to Rule 59.
8. At all times material to this cause of action Anchor was the authorized agent and representative of Central for purposes of managing the Welfare Benefit Plan provided to Plaintiff by Central.
9. Central was at all times material to this cause of action the Administrator of an Employee Welfare Benefit Plan which provided benefits to Plaintiff for injuries arising from the work related accident made part of this suit.
10. Defendant ANCHOR RISK MANAGEMENT, acting within its scope of authority for Cental, failed or refused to assert any subrogation interest, if any, prior to any settlement between Smokers' and Plaintiff. Further Anchor acting together with Republic procured an indemnity agreement providing that Plaintiff would indemnify Republic and Smokers' for a subrogation interest that only Republic and Anchor (Central) knew was being asserted. As

such any interest, if any, has been waived and for laches.

11. PLAINTIFF NEWBROUGH further sues for reasonable and customary attorney's fees pursuant to Chapter 37, Tex. Civ. Prac. & Rem. Code as well as Chapter 541, Tex. Ins. Code. In addition, Plaintiff brings this claim pursuant to Tex. Civ. Prac. & Rem. Code, Section 140.

VII.

Claims against Central and Anchor for Breach of Fiduciary Duty and Fraud

CENTRAL IS A FIDUCIARY

1. Defendant Central has alleged it has paid benefits pursuant to an ERISA approved Employee Welfare Benefit Plan. (Central's Counter-Claim page 3, paragraph V.) and is the Administrator of the Plan. As the Administrator of the Plan, Central owes FIDUCIARY DUTIES to all beneficiaries including Plaintiff. Varity Corp v. Howe, 516 U.S. 489 (1996).
2. ERISA specifically provides that ONLY FIDUCIARIES can bring actions for recovery under the plan as Central has done here. Thus, by judicial admission Central is a FIDUCIARY as to Plaintiff Newbrough. Humana Health Plan Inc v. Nguyen, 785 F. 3d 1023 (5th Cir 2015).
- 3 Central has previously filed claims AS FIDUCIARY OF AN ERISA PLAN. **See Exhibit 1** attached hereto pursuant to Rule 59, and incorporated by reference for the purposes of showing FIDUCIARY STATUS AND KNOWLEDGE THAT CENTRAL IS A FIDUCIARY.
4. As a result of Central's judicial admissions, conduct and the Plan itself in this case, Central is a FIDUCIARY as to all Beneficiaries of the plan, specifically and including

Plaintiff.

ANCHOR IS A FIDUCIARY

5. ERISA provides that any and all agents of the Administrator, and including the Administrator owe FIDUCIARY DUTIES to the beneficiaries of the Plan.
6. Agents are fiduciaries pursuant to ERISA when they exercise discretion in the handling or management of the Plan. Varity v. Howe, 516 U.S. 489 (1996).
7. Anchor exercised management and discretion in its handling of the plan with regard to Plaintiff's claim. Pursuant to Rule 59 Plaintiff attaches and incorporates by reference the affidavit Debra Harvey and payment summaries from Anchor showing the management and the exercise of discretion in the handling of Plaintiff's claim pursuant to the Plan.
Exhibit 2 In Harvey's affidavit paragraph number 1 she testifies that she was assigned the task of management of the claim by Central. The billing summaries attached show that Anchor made the payments for medical in this case. As a result of the above, Anchor is a FIDUCIARY as the Plaintiff. Varity Corp v Howe, 516 U.S. 489 (1996).

DUTIES OWED TO PLAINTIFF PURSUANT TO ERISA

8. ERISA applies trust law to the actions and inactions of fiduciaries. Varity Corp v. Howe, 516 U.S. (1996); Rhea v. Ritchey, 16-41032, (5th Cir. 2017). Fiduciaries in trust law and in ERISA law both impose upon the FIDUCIARY a duty of LOYALTY. Kujanek v. Houston Poly Ban I, LTD., 658 F.3d 483 (5th Cir 2011). **THAT DUTY INCLUDES THE DUTY TO DISCLOSE MATERIAL FACTS TO BENEFICIARIES WHEN THOSE FACTS ARE RELEVANT TO THE BENEFICIARY AND ARE FACTS**

THAT THE BENEFICIARY SHOULD KNOW. See id. At 488.

FRAUD

9. A fraud cause of action will lie when the facts establish the following elements; (Plaintiff attaches the PJC sections 105.2 pursuant to Rule 59 and incorporates them by reference in this petition.). **Exhibit 3.**
 - A. The defendant makes a material misrepresentation, and
 - B. The misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion, and
 - C. The misrepresentation is made with the intention that it should be acted on by the other party, and
 - D. The other party relies on the misrepresentation and thereby suffers injury.

FACTS FOR MATERIAL MISREPRESENTATION

10. Attached to this petition pursuant to Rule 59 and incorporated by reference is **Exhibit 4.** This exhibit is the affidavit of Mark Cevallos, one of the lawyers for Plaintiff, and exhibits that were attached to the Response to Summary Judgment in this matter.
11. Plaintiff was injured in a work related accident on or about June 18, 2015, while in the course of his employment with Central and while making a delivery to a customer of Central, Smokers', which accident was the direct and proximate of the negligence of both Central and Smokers'. Plaintiff reported his accident to Central and Central began paying for medical through the manager Anchor.
12. Plaintiff through counsel notified both Smokers' and Anchor of his third party claim by

letter dated September 2, 2015. Other than the lawsuit against Plaintiff, Plaintiff has never received from Anchor or Central a demand for subrogation from any policy or ERISA plan. Anchor has not ever sent a demand or notice of subrogation to Plaintiff in response to the notice letter dated September 2, 2015.

13. Anchor and Central are required to assert any liens and demand payment prior to any settlement, or waive them. By their conduct Anchor and Central represented to Plaintiff they did not intend to assert any lien on Plaintiffs recovery.
14. Between March 2016 and the end of May 2016, Republic, which is the liability carrier for Smokers' negotiated a settlement of Plaintiff's claims against Smokers'.
15. Republic had an agent, a licensed adjuster named James Rushing, who was an authorized agent and representative of Defendant Republic negotiating with authority Plaintiff's claims against Smokers'. All of Rushing's actions were authorized and ratified by vice principals of Republic.
16. In May of 2016, Rushing made a "drop dead" offer to Plaintiff of \$35,000. The offer was accepted. Rushing brought up the issue of subrogation. Plaintiff advised that no notice of subrogation had been sent to Plaintiff, and none asserted.
17. On May 13, 2016, Rushing asked for and received from Plaintiff a letter indemnifying Republic for all liens or subrogation interests.
18. A release between Plaintiff and Smokers' by and through Smokers' liability carrier was executed on May 20, 2016 for \$35,000.
19. On May 23, 2016, after the indemnity letter and after the release was signed, Rushing advised that his supervisor was of the opinion that the lien was a workers compensation

lien, and was automatic.

20. Rushing did not advise that he had been placed on notice of a **workers compensation** lien.
21. Plaintiff's claim was not a workers' compensation lien pursuant to the Texas Labor Code and Rushing was so advised.
22. On the same day, May 23, 2016, Rushing advised that "some lady called from the insurance company Anchor Risk Management to say they were the Workers' Compensation provider."
23. Anchor represented to Republic that its lien was a statutory workers compensation lien, which is a lien provided pursuant to the Texas Labor Code. This representation is not true and Anchor knows it the be untrue.
24. In her affidavit Debra Harvey testifies that she is the manager for the Central Employee Benefit Occupational Injury Plan and was charged with the duty by Central and Anchor to manage the Plan.
25. She then testifies that Central is a self-insured **non-subscriber** to the Texas Workers' Compensation program, meaning not providing Texas workers' compensation pursuant to the Texas Labor Code.
26. Debra Harvey testifies in her affidavit that she received and anonymous phone call on May 12, 2016, **prior to the release being signed. Prior to the indemnity letter being signed.**
27. Debra Harvey testifies that on May 13, 2016 she was contacted by an adjuster for

Republic who requested a subrogation letter to Republic from Anchor. Harvey sent the attached lien letter dated May 13, 2016, which is attached pursuant to Rule 59 and incorporated by reference. **Exhibit 5.**

28. In Debra Harvey's affidavit attached as Exhibit 2 pursuant to Rule 59 and incorporated by reference, paragraph number 6, page 2 she testifies that she intentionally never notified Plaintiff or his lawyers about any lien or subrogation interest. It is clear from the evidence attached she had more than sufficient time to do so, after the original letter to her and prior to the settlement after sending the letter to Republic. There is no reasonable explanation why she did not copy Plaintiff on the letter to Republic. The only rational and reasonable conclusion is from her own testimony that she intended not to which is a clear, intentional breach of her fiduciary duties and is fraud for which Plaintiff sues.

FRAUD FOR FAILURE TO DISCLOSE

29. Plaintiff attaches **Exhibit 6** copies of section 105.4 of the PJC pursuant to Rule 59 and incorporates same by reference.
30. Central and Anchor can be held liable for Fraud when:
- A. They failed to disclose a material fact within the knowledge of that party;
 - B. They knew that Plaintiff was ignorant of the fact and he did not have an equal opportunity to discover the truth, and
 - C. They intended to induce Plaintiff to take some action by failing to disclose the fact, and
 - D. Plaintiff suffered injury as a result of acting with knowledge of the undisclosed fact.

31. The failure to disclose sections for Fraud require some duty to disclose. That duty exists as to both Central and Anchor. See paragraph 8 under Duties owed to Plaintiff pursuant to ERISA previous and see Kujanek v. Houston Poly Ban I, LTD., 658 F.3d 483 (5th Cir 2011); Tex. Insurance Code section 541.

FACTS SUPPORTING FAILURE TO DISCLOSE

32. According to the affidavit of Mark Cevallos, attached hereto pursuant to Rule 59 and incorporated by reference, no person or entity advised of any asserted subrogation interest prior to the settlement. Exhibit 4. Anchor and Central with full knowledge and awareness of a pending settlement sent subrogation notices to only one party to the settlement, not the person to whom they owed fiduciary responsibilities. This malicious conduct was intended to have Plaintiff settle its claim and then seek a full reimbursement from Plaintiff and his lawyers as Central as done in the past. Plaintiff is damaged because there would have been no settlement if the subrogation interest had been fully disclosed.
33. According to the affidavit of Debra Harvey paragraph 5 and 6 of Exhibit 2, she issued a letter to Republic, but intentionally did not disclose anything to Plaintiff.
34. This conduct is FRAUD and is further intentional and malicious and specifically directed at Plaintiff for which he sues.
35. As a result of the facts alleged in these sections against Central and Anchor Plaintiff sues both CENTRAL AND ANCHOR for Breach of Fiduciary Duty.

VIII.

CONSPIRACY

1. The PJC question and instruction on Civil Conspiracy is attached hereto and incorporated

by reference pursuant to Rule 59. **Exhibit 7.**

2. For Plaintiff to have a claim for Civil Conspiracy there must be an underlying tort. In this case it is Fraud, Insurance Code, and Breach of Fiduciary Duty.
3. The elements are that Republic by and through its authorized agent and employee, whose conduct was supervised by a vice principal and ratified by a vice principal, and Debra Harvey, a vice principal of Anchor, and Anchor (Central), had knowledge that any subrogation interest was undisclosed to Plaintiff and Republic, Anchor, and Central, agreed to and intended to keep that information secret and hidden from Plaintiff for the common objective of settling the case and specifically harming Plaintiff by making sure that he was settling a claim for some other party, Anchor and Central, with the intended purpose of insuring he received nothing. All parties acted in furtherance of the conspiracy by sending secret letters and keeping information material to Plaintiff secret at the same time as securing indemnity agreements from Plaintiff prior to any settlement.
4. Plaintiff brings this suit against Central, Anchor and Republic for Conspiracy pursuant to the evidence attached Exhibits 2,4,5 for Conspiracy to commit Fraud, Breach of Fiduciary Duty and Insurance Code Violations.
5. Plaintiff relies upon the allegations and exhibits referenced in paragraphs numbered 10-34 above.
6. As a result of the facts alleged in Paragraph VII, Plaintiff sues Central and Anchor for Breach of Fiduciary Duty, Fraud, and Texas Insurance Code violations under §541.

IX.

CLAIMS AGAINST REPUBLIC

1. As are result of the facts alleged in paragraphs numbered VII and VIII specifically sections CENTAL IS A FIDUCIARY, ANCHOR IS A FIDUCIARY, DUTIES OWED TO PLAINTIFF PURSUANT TO ERISA, FACTS FOR MATERIAL MISREPRESENTATION, AND FAILURE TO DISCLOSE, Plaintiff brings this case against Republic for FRAUD.
2. Plaintiff says that Rushing was an authorized agent of Republic at all times material to this suit.
3. Plaintiff says that at all time material to this suit, Rushing was supervised by a vise principal for Republic.
4. Plaintiff says that Republic by and through a vise principal either specifically authorized Rushing conduct or ratified his conduct in this matter.
5. As a result of the conduct alleged in paragraph 1 of this section, Plaintiff sues Republic for Fraud (Both misrepresentation and failure to disclose), violations of the Texas Insurance Code section 541, Conspiracy.
6. Plaintiff further, and in the alternative, brings this suit against Republic to vitiate the contracts entered into in this matter for the reason that same were procured by fraud.
7. Further and in the alternative, Plaintiff further seeks to enforce the agreements between Plaintiff and defendant Republic (Smokers'), but to require Republic to assume the liability for any and all liens or subrogation interests in this case which resulted from the facts alleged herein.

X.

Claims against Smoker's Outlet, Inc.

CONTRACTUAL CLAIMS

1. Plaintiff brings this suit against SMOKER'S OUTLET, INC. to either enforce, or in the alternative, set aside the release agreement between the parties. At the time of the execution of the release Plaintiff was unaware of any alleged subrogation or reimbursement interest having been asserted by any party. Because the release was intended to settle all claims Plaintiff sues to enforce the contract, which require payment of settlement funds only to him and his counsel, or in the alternative, set aside the release agreement and proceed forward litigating his tort claims against SMOKER'S OUTLET, INC.
2. As a result of the facts alleged herein and attached hereto, Plaintiff says that as a result of Republic's conduct the settlement agreement should be enforced and require Republic to assume all liability for any subrogation interest Republic hid, concealed and secreted from Plaintiff.
3. In the alternative, the entire settlement agreement should be set aside and the parties reinstated to the facts and circumstances as they existed prior to any fraudulent inducement from Republic.
4. In the alternative, if Plaintiff is liable to Central and or Anchor for any interest, then that liability should become the damages to and responsibility of Republic to pay.
5. Plaintiff brings this suit pursuant to the Texas Insurance Code section 541 for liability therein and for attorney fees and additional or punitive damages pursuant to that statute.

PREMISES CLAIMS

1. Plaintiff brings this suit against SMOKER'S OUTLET, INC. to recover for personal injuries that were suffered as a result of the negligence of the defendant in Ector County, Texas on

or about June 18, 2015.

2. Plaintiff, while exercising due care for his own safety, was a business invitee on the premises of SMOKER'S OUTLET, INC., when he was tripped and fell on a dangerous condition on the premises, sustaining personal injuries. Defendant knew or should have known of the dangerous condition on the premises and failed to remedy same, specifically, that the hole in question was not properly covered and presented a dangerous condition.

At the time and on the occasion in question, Defendant was negligent of various acts and omissions, which negligence was the proximate cause of the occurrence in question and the injuries sustained by Plaintiff.

3. As a result of the incident above described the Plaintiff suffered severe personal injuries, causing Plaintiff to incur reasonable and necessary medical expenses, physical pain and mental anguish, disfigurement, impairment, loss of earnings, all in the past and in reasonable probability, will continue to suffer same in the future by reason of the nature and severity of the Plaintiff' injuries , as a result of Defendants' negligence for which Plaintiff sues.

XI.

Damages

1. Plaintiff relied upon the representations and the failure to represent alleged in this petition. Plaintiff entered into a settlement and fully indemnify a party to that settlement at a time the willful and intentional fraud and fraudulent concealment existed. Plaintiff would not have entered into the agreements that he did had all facts been as represented and had all facts and positions of the parties been fully disclosed.
2. Plaintiff has been damaged in the amount of \$35,000, the amount of the settlement.

3. Plaintiff has been damaged for delay and for attorney fees pursuant to the Declaratory Judgment Statute, Texas Insurance Code section 541 and the Texas Civ Prac and Rem Code.
4. Plaintiff suffered personal injuries arising from the accident for physical pain and mental anguish, loss of earnings and loss of earning capacity, physical impairment and medical expenses, all in the past and in reasonable probability in the future.
5. Plaintiff sues for all actual and exemplary damages or punitive damages both statutory pursuant to the Civ Pract and Rem Code, Texas Ins. Code.
6. By reason of the above and foregoing, Plaintiff has been damaged in a sum within the minimum jurisdictional limits of this court in excess of \$100,000 but less than \$200,000.

X.

Pursuant to Rule 194, Plaintiff requests Defendants to disclose, within fifty (50) days of service of this request, the information or material described in Rule 194.2 (a)-(l). (To only those Defendants who have not previously responded to Disclosures)

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that Defendants appear herein and that upon a final trial of this cause, Plaintiff recover: judgment against Defendants for Plaintiff's damages as set forth above in an amount within the minimum jurisdictional limits of this court; prejudgment interests on Plaintiff's damages as allowed by law, attorney fees, a declaratory judgment as alleged herein, punitive damages as alleged herein, interest on the judgment at the legal rate; costs of court; and such other and further relief to which Plaintiff may be entitled.

Respectfully submitted,

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By: /s/ KEVIN B. MILLER
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ATTORNEYS FOR PLAINTIFF

PLAINTIFFS DEMANDS TRIAL BY JURY.

CERTIFICATE OF SERVICE

By my signature below I certify that the foregoing have been served pursuant to TRCP 21a on the 16th day of June, 2017 upon:

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CERTIFICATE OF SERVICE, cont'd

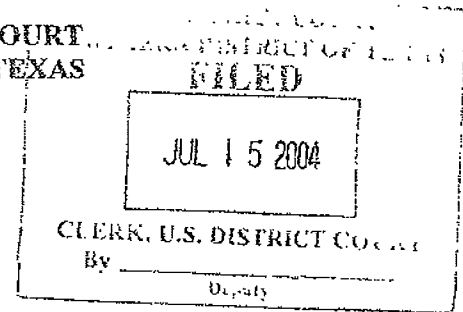
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/s/ KEVIN B. MILLER
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EXHIBIT 1

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION



CENTRAL FREIGHT LINES, INC.
(as fiduciary of the CENTRAL FREIGHT
LINES, INC. HEALTH CARE PLAN)

Plaintiff,

CIVIL ACTION
FILE NO.

v.

RICHARD DANNER, JR. and
JAMES SHIFLET

3:04-cv-01542-K

COMPLAINT

COMES NOW, Central Freight Lines, Inc. for its Complaint against the Defendants, states and alleges as follows:

NATURE OF ACTION, PARTIES, JURISDICTION AND VENUE

1. This is an action for equitable relief to enforce the terms of an employee welfare benefit plan under the terms of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1000-1461.
2. Plaintiff, Central Freight Lines, Inc. ("CFL") is the fiduciary of a self-funded employee benefit plan ("Plan"). CFL is authorized to bring this action on behalf of all Plan participants to enforce the terms of the Plan and to protect the assets of the Plan under 29 U.S.C. §1132(a)(3).
3. Defendant Richard Danner, Jr. is an attorney that currently has control of the funds in this case in his client trust account. This is an action for the imposition of a

constructive trust and other equitable relief to recover these funds. No money damages are being sought from the Defendants in this matter.

4. Defendant James Shiflet ("Shiflet") was at all relevant times a participant in the Plan and subject to all terms and provisions of the Plan document. The disputed funds are held by Richard Danner, Jr. in trust for the benefit of Shiflet.

5. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §1331 as this is an action to enforce the terms of an employee welfare benefit plan under ERISA.

6. Pursuant to 29 U.S.C. §1132(e)(2) venue is proper in this Court because the Defendants reside in this District and because the breach of the Plan provision has occurred and is occurring in this district.

FACTUAL ALLEGATIONS

7. At all times relevant herein, Shiflet was a participant in the Plan issued by Central Freight Lines, Inc. as part of its employee benefit plan.

8. On or about December 2, 2002, James Shiflet sustained personal injuries in an automobile accident.

9. The Plan extended benefits in the amount of \$39,500.40 as a result of the automobile accident.

10. The Plan contains an express provision which provides for the Plan's first priority right on behalf of the Plan from any personal injury recovery received from a third party. Attached hereto as Exhibit A is a true and correct copy of the applicable provisions of the Plan, which are incorporated by reference herein.

11. The Plan provision further requires the covered person to reimburse the Plan by conveying the funds from the recovery, (1) "even if the Covered Person is only partially

compensated for all losses”; and (2) “whether or not said losses reflect medical or dental charges covered by this Plan”; and (3) in priority of “non medical or dental charges, attorney fees, or other costs and expenses”.

12. The Plan, through its representatives, was informed that James Shiflet made a recovery arising out of the personal injury claim, and that such funds are being held in the trust account of Defendant, Richard Danner, Jr.

13. Despite repeated requests, Defendants have refused to turn over the funds, contending that the Plan has no right to the funds and have hereby breached the terms of the Plan and ERISA.

EQUITABLE RELIEF

14. Pursuant to § 1132(a)(3), the Plaintiff seeks equitable relief against Defendants to enforce ERISA and the terms of the Plan.

15. Defendants’ refusal to turn over the funds violates the terms of the Plan and ERISA. Plaintiff is entitled to equitable restitution in the form of a constructive trust or equitable lien with respect to the funds held in the Richard Danner, Jr. trust account.

16. The funds currently controlled by Richard Danner, Jr. should be ordered to be turned over to the Plaintiff in order to enforce the terms of the Plan and ERISA.

WHEREFORE, the Plaintiff seeks the following relief:

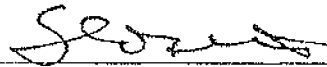
- a. For service upon the Defendants as required by law;
- b. An order imposing a constructive trust and/or an equitable lien in favor of the Plaintiff upon any funds or any property into which they have been converted which is in the Defendants’ possession or under the Defendants’ control;

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- c. An order enjoining the Defendants from dissipating any of the settlement funds until Plaintiff's rights can be adjudicated;
- d. An order enjoining the Defendants from transferring or disposing of the settlement funds which would prejudice, frustrate or impair Plaintiffs's ability to recover same;
- e. An order awarding to Plaintiff reasonable attorney's fees and costs incurred herein, pursuant to section 29 U.S.C. §1132(g)(1); and
- f. Other and further equitable relief to which Plaintiff may be entitled.

This 15 of July, 2004.

SHARPS & ASSOCIATES, PSC



Stephen Gossett
Attorney for Plaintiff

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Facsimile: (469) 232-0261

OTHER PARTY RECOVERY PROVISION**RIGHT OF SUBROGATION AND REFUND**

When this provision applies. The Covered Person may incur medical or dental charges due to injuries which may be caused by the act or omission of another party or another party may be responsible for payment. In such circumstances, the Covered Person may have a claim against that other party, or insurer, for payment of the medical or dental charges. Accepting benefits under this Plan for those incurred medical or dental expenses automatically assigns to this Plan any rights the Covered Person may have to recover payments from any other party or insurer. This subrogation right allows this Plan to pursue any claim which the Covered Person has against any other party, or insurer, whether or not the Covered Person chooses to pursue that claim. The Plan may make a claim directly against the other party or insurer, but in any event, this Plan has a first priority lien on any amount recovered by the Covered Person whether or not designated as payment for medical expenses. This first priority lien shall remain in effect until this Plan is repaid in full.

The Covered Person:

- (1) Automatically assigns to this Plan his or her rights against any other party or insurer when this provision applies; and
- (2) Must repay to this Plan the benefits paid on his or her behalf out of the recovery made from the other party or insurer.

Amount subject to subrogation or refund. The Covered Person agrees to recognize this Plan's first priority right to subrogation and reimbursement. These rights provide this Plan with a first priority with respect to any funds paid by another party to a Covered Person relative to the Injury or Illness, even if the Covered Person is only partially compensated for all losses. The Plan's priority recovery right includes a priority over any claim for non-medical or dental charges, attorney fees, or other costs and expenses. Any so-called "make whole" or "full compensation" rule or doctrine is hereby explicitly rejected and disavowed.

Notwithstanding its priority to funds, this Plan's subrogation and refund rights, as well as the rights assigned to it, are limited to the extent to which this Plan has made, or will make, payments for medical or dental charges as well as any costs and fees associated with the enforcement of its rights under this Plan.

When a right of recovery exists, the Covered Person will execute and deliver all required instruments and papers as well as doing whatever else is needed to secure this Plan's right of subrogation as a condition to having this Plan make payments. In addition, the Covered Person will do nothing to prejudice the right of this Plan to subrogate.

Defined terms: "Recovery" means monies paid to the Covered Person by way of judgment, settlement, or otherwise to compensate for all losses caused by the Injuries or Illness whether or not said losses reflect medical or dental charges covered by this Plan.

"Subrogation" means this Plan's right to pursue the Covered Person's claims for medical or dental charges against the other person.

"Refund" means repayment to this Plan for medical or dental benefits that it has paid toward care and treatment of the Injury or Illness.

Note: As used only in this provision, the term "Covered Person" is deemed to include any legal or personal representative, parent, guardian, or estate of a Covered Person.

Recovery from another plan under which the Covered Person is covered. This right of refund also applies when a Covered Person recovers under an uninsured or underinsured motorist plan, homeowner's plan, renter's plan, medical malpractice plan or any liability plan.

JS-44 (Rev. 4/87)

Case 3:04-cv-01542-K Document 1 Filed 07/15/04 Page 1 of 6 PageID 1

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1992, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO)

I. (a) PLAINTIFFS Central Freight, Inc. (as fiduciary of the Central Freight Lines, Inc. Health Care Plan)		DEFENDANTS Richard Danner, Jr. James Shiflet		RECEIVED JUL 15 2004 CLERK, U.S. DISTRICT COURT NORTHERN DISTRICT OF TEXAS
(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF (EXCEPT IN U.S. PLAINTIFF CASES) McLennan County, Texas		COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT (IN U.S. PLAINTIFF CASES ONLY) NOTE IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.		
(c) ATTORNEYS (FIRM NAME, ADDRESS AND TELEPHONE NUMBER) Stephen Gossett, Sharps & Associates, PSC 5949 Sherry Lane, Suite 1550, Dallas TX 75225 (214) 360-0044		ATTORNEYS (IF KNOWN) Richard Danner, Jr. 3-04CV-1542K		

II. BASIS OF JURISDICTION (PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
☐ 2 U.S. Government Defendant
☒ 3 Federal Question (U.S. Government Not a Party)
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|---------------------------------------|---|---------------------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input checked="" type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input checked="" type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. ORIGIN

(PLACE AN "X" IN ONE BOX ONLY)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from Another district (specify):
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

V. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defuncted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	TORTS PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employees Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury Med. Malpractice <input type="checkbox"/> 365 Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	FORFEITURE/PENALTY <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 655 Occupational Safety/Health <input type="checkbox"/> 660 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 750 Other Labor Litigation <input checked="" type="checkbox"/> 761 Employee's Inc. Security Act	BANKRUPTCY <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1995) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (US Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7602	OTHER STATUTES <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commercial/CC Rules/etc <input type="checkbox"/> 460 Deposition <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 510 Selective Service <input type="checkbox"/> 550 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 890 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 250 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motion to Vacate Sentence Habeas Corpus <input type="checkbox"/> 520 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

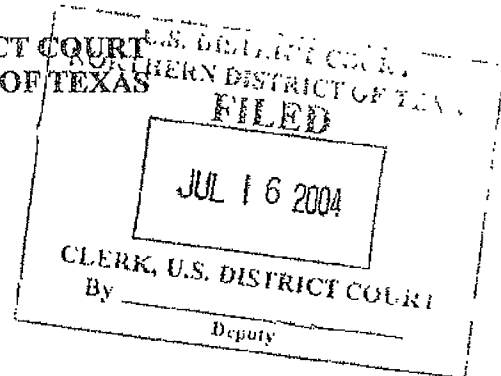
VI. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY) 29 U.S.C. § 1132(a)(3), action for equitable relief under ERISA to enforce plan terms.

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION ☐ DEMAND \$ 20,000.00 ☐ CHECK YES only if demanded in complaint: ☐ JURY DEMAND: ☐ YES ☒ NO

VIII. RELATED CASE(S) IF ANY

7/15/04
 DATE SIGNATURE OF ATTORNEY OF RECORD

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION



CENTRAL FREIGHT LINES, INC.
(as fiduciary of the CENTRAL FREIGHT
LINES, INC. HEALTH CARE PLAN)

Plaintiff,

CIVIL ACTION
FILE NO. 3-04CV-1542K

v.

RICHARD DANNER, JR. and
JAMES SHIFLET

BRIEF IN SUPPORT OF TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION

I. FACTUAL BACKGROUND

1. On or about December 2, 2002, James Shiflet was injured in an accident and incurred medical expenses as a result of that accident.
2. On or after the date of the accident, Shiflet, as a participant of the Central Freight, Inc. Health Care Plan (the "Plan"), was eligible to, and did, receive benefits under the Plan for medical expenses that Shiflet sustained in the accident.
3. On December 2, 2002, and all material times thereafter, the Plan contained a reimbursement provision, requiring that Shiflet reimburse the Plan if he recovered money from another source as a result of the accident.
4. Shiflet received benefits totaling \$39,500.40 under the Plan, subject to and conditioned upon the Plan's right of reimbursement up to the amount of the recovery Shiflet obtained for claims arising out of the accident.

5. Shiflet retained James G. Danner, Jr. to represent him with regard to his claims arising out of the accident.
6. Shiflet settled one claim arising out of the accident for \$20,000.
7. In spite of the Plan's rights as set forth in the Plan document, defendants have failed to reimburse the Plan, have failed and refused to pay the amount demanded by and belonging to the Plan, and have therefore been unjustly enriched by the retention monies paid in settlement of Shiflet's claims arising out of the accident.
8. On information and belief, the settlement funds are being held in the trust account of James G. Danner, Jr. ("Danner").
9. After an attempt to negotiate the Plan's interest in the funds held in his trust account, Danner advised that he would no longer agree to hold the funds in trust.

II. ARGUMENT

A. Standard for Issuance of a Temporary Restraining Order

A court may issue a temporary restraining order or preliminary injunctive relief if the Plaintiff establishes the following four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the plaintiff will suffer irreparable injury if the injunction is denied; (3) that the threatened injury outweighs any damage that the injunction might cause the defendants; and (4) that the injunction is will not disserve the public interest. *See Sugar Busters LLC v. Brennan*, 177 F.3d 28 (5th Cir. 1999).

B. Temporary Restraining Order is Warrented

1. *The Plan Will Likely Prevail on the Merits*

To obtain a temporary restraining order, the Plan must demonstrate that there is a substantial likelihood that it will ultimately prevail on the merits. *Sugar Busters* at 265.

Only a likelihood must be shown; the Plan does not need to prove that it will prevail. *See Wail v. Coughlin*, 754 F.2d 1015, 1025 (2nd Cir. 1985).

Here, the Plan seeks equitable restitution in the form of a constructive trust over settlement proceeds held in trust for the plan participant by the plan participant's attorney. This case is indistinguishable from *Bombardier Aerospace Employee Welfare Benefit Plan v. Ferrer, Poirot and Wansbrough*, 354 F.3d 348 (5th Cir. 2003), *cert. denied*, 124 S.Ct. 2412 (2004). In *Bombardier*, the plan participant retained a law firm to seek recovery from a tortfeasor responsible for injuries he received in an automobile accident. After negotiating a \$65,000 settlement, the law firm received payment and placed the funds in a trust account in the law firm's name. The ERISA plan had advanced medical expenses in the amount of \$13,643.63 under plan documents that required reimbursement when a plan participant made a recovery from another source. The plan participant refused to reimburse the plan out of the settlement proceeds. The plan then brought an action under §502(a)(3) against the law firm (who held the funds) requesting the imposition of a constructive trust over the disputed funds. The district court granted the plan's request and the plan participant and the law firm appealed.

The Fifth Circuit affirmed the decision of the trial court, and established a three part test to determine whether a claim under ERISA 29 U.S.C. §1132(a)(3) is equitable: "Does the Plan seek to recover funds (1) that are specifically identifiable, (2) that belong in good conscience to the Plan, and (3) that are within in the possession of the defendant...". *Id.* at 356.

Central Freight's claim meets all of the elements of this test. First, the plan seeks funds that are specifically identifiable and traceable to the tort settlement. Second, the funds belong in good conscience to the plan under a valid reimbursement provision in the plan. Finally, the funds are in the possession and control of the plan participant's trustee.

2. *The Plan Will Suffer Irreparable Injury if a TRO Is Not Issued*

The Plan faces a clear prospect of irreparable injury if the settlement funds are dissipated. In *Great West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), the United States Supreme Court held that plaintiffs such as the Plan can only maintain actions in equity under 29 U.S.C. §1132(a)(3). In explaining the difference between actions in equity and actions at law, the Court held:

[A] plaintiff could seek restitution in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession...A court of equity could then order a defendant to transfer title (in the case of a constructive trust) or to give a security interest (in the case of an equitable lien) to a plaintiff who, in the eyes of equity, was the true owner...But where the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, the Plaintiff's claim is only that of a general creditor and the plaintiff cannot enforce a constructive trust or an equitable lien on the property of the defendant.

Id. at 213 (emphasis added).

Therefore, if the defendants are allowed to disburse the settlement funds, such that they are no longer in the defendants' possession or otherwise identifiable and traceable, ERISA would not permit a remedy against the defendants. Also, any right or remedy provided under Texas law against the plan participant would be completely pre-empted by ERISA. See *Aetna v. Davila*, 124 S.Ct. 2488 (2004).

3. *The Threatened Injury Outweighs Potential Harm*

The Plan must show that the potential injury that it faces outweighs that which would be sustained by Defendants if a temporary restraining order were granted. As stated above, the Plan faces the threat of forever losing its interest in the settlement proceeds. On the other hand, Defendants face no potential injury from preliminary injunctive relief from the Court, except a

small delay in the availability of the funds. Should this Court ultimately decide that the Plan has no rights to the disputed funds, the funds will be immediately available for disbursement.

4. *The Public Interest is Not Relevant to This Request for Relief*

The public interest should be considered in deciding whether to grant preliminary injunctive relief in cases where that interest may be affected. *See Sammartano v. First Judicial District Ct.*, 303 F.3d 959, 974 (9th Cir. 2002). Here, there is no potential impact on the public interest – the temporary restraining order in this case would only prevent the immediate disbursement of the disputed funds.

III. CONCLUSION

Because the disputed funds held in trust by Richard G. Danner, Jr. belong in equity to the Plan, this Court should issue an order restraining and enjoining the defendants from disbursing the money held in trust for James Shiflet.

Respectfully Submitted,

SHARPS & ASSOCIATES, PSC

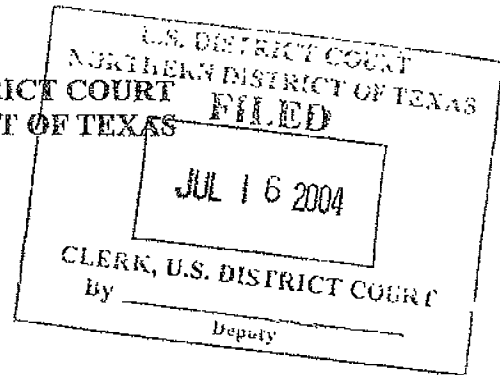


Stephen Gossett
Texas Bar No. 08226700
Attorney for Plaintiff

Sterling Plaza
5945 Sherry Lane, Suite 1550
Dallas, Texas 75225
Telephone: (214) 360-0044
Facsimile: (469) 232-0261

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**



**CENTRAL FREIGHT LINES, INC.
(as fiduciary of the CENTRAL FREIGHT
LINES, INC. HEALTH CARE PLAN)**

Plaintiff,

**CIVIL ACTION
FILE NO.**

3-04CV-1542K

v.

**RICHARD DANNER, JR. and
JAMES SHIFLET**

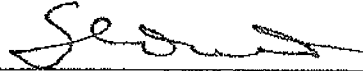
PLANTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

Comes now, Central Freight and moves this Court pursuant to F.R.C.P. 65(a) and requests that this Court enter a temporary restraining order and preliminary injunction (1) enjoining Richard G. Danner, Jr. from disbursing the \$20,000 settlement funds to James Shiflet, directly or indirectly; (2) enjoining James Shiflet from disposing of or intermingling with his own funds any of the settlement proceeds he may receive; and (3) if such proceeds have been received by Shiflet, that he place such funds in a separate account until the Plan's rights can be adjudicated.

Central Freight further moves this Court for a hearing on this matter at the Court's earliest convenience.

In support of its Motion, Central Freight relies upon its supporting brief, the affidavit of Sharon Bowers, the affidavit of John D. Kolb, and all other pleadings or discovery on file or to be filed with the Court.

SHARPS & ASSOCIATES, PSC



Stephen Gossett
Texas Bar No. 08226700
Attorney for Plaintiff

Sterling Plaza
5945 Sherry Lane, Suite 1550
Dallas, Texas 75225
Telephone: (214) 360-0044
Facsimile: (469) 232-0261

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

**CENTRAL FREIGHT LINES, INC.
(as fiduciary of the CENTRAL FREIGHT
LINES, INC. HEALTH CARE PLAN)**

Plaintiff,

**CIVIL ACTION
FILE NO.**

v.

**RICHARD DANNER, JR. and
JAMES SHIFLET**

AFFIDAVIT OF SHARON BOWERS

STATE OF KENTUCKY §
 §
COUNTY OF JEFFERSON §


BEFORE ME, the undersigned authority, on this day personally appeared Sharon Bowers who being duly sworn, deposed, and stated as follows:

My name is Sharon Bowers. I am over the age of twenty-one and competent in all respects to make this affidavit.

2. I am a claims supervisor with Healthcare Recoveries -- which provides subrogation and recovery services to the Central Freight Lines, Inc. Health Care Plan. I am personally familiar with the facts of this case, and have personal knowledge of the statements contained in this affidavit. I swear that each statement in this affidavit is true and correct and made under the penalty of perjury.

3. The Central Freight Lines, Inc. Health Care Plan has extended benefits in the amount of \$39,500.40 for treatment of injuries related to the a motor vehicle accident that occurred on or about December 2, 2002.
4. As of today, neither Healthcare Recoveries nor Central Freight Lines, Inc. Health Care Plan have been reimbursed for those benefits.

FURTHER AFFIANT SAYETH NOT.


Sharon Bowers

SWORN TO AND SUBSCRIBED before me, the undersigned, this 16th day of July, 2002.


Notary Public, State of Kentucky

My Commission Expires: 6-29-08

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

**CENTRAL FREIGHT LINES, INC.
(as fiduciary of the CENTRAL FREIGHT
LINES, INC. HEALTH CARE PLAN)**

Plaintiff,

**CIVIL ACTION
FILE NO. 3-04CV-1542K**

v.

**RICHARD DANNER, JR. and
JAMES SHIFLET**

AFFIDAVIT OF JOHN D. KOLB

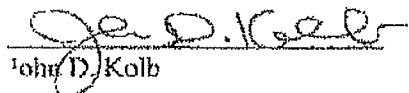
**STATE OF KENTUCKY §
 §
COUNTY OF JEFFERSON §**

BEFORE ME, the undersigned authority, on this day personally appeared John D. Kolb who being duly sworn, deposed, and stated as follows:

- My name is John D. Kolb. I am over the age of twenty-one and not under any disability that would preclude my making this affidavit.
2. I am an attorney at the law firm of Sharps & Associates, PSC, the firm retained as counsel for plaintiff, Central Freight Lines, Inc.
 3. In this capacity, I am personally familiar with facts outlined in this affidavit.
 4. On June 18, 2004, I spoke with Richard G. Danner, Jr., counsel for James Shiflet who advised me that Mr. Shiflet had settled his claim against one underinsured motorist carrier for policy limits of \$20,000. Mr. Danner also advised that the proceeds of the settlement were held in his trust account.

5 On July 15, 2004, I received a facsimile from Mr. Danner advising that he will no longer agree to retain the settlement proceeds in his account. A copy of the facsimile is attached as Exhibit A.

FURTHER AFFIANT SAYETH NOT.


John D. Kolb

SWORN TO AND SUBSCRIBED before me, the undersigned, this 16 day of July, 2002.


Notary Public, State of Kentucky

My Commission Expires: May 2, 2008

Richard G. Danner, Jr.
ATTORNEY AT LAW
6440 N. CENTRAL EXPRESSWAY, SUITE 515
DALLAS, TEXAS 75206

Richard G. Danner, Jr.
Board Certified Personal
Injury Trial Law -
Texas Board of Legal Specialization

(214) 987-0066
(214) 368-1966 Fax
Email: rgd@rgdlaw.com

July 15, 2004

VIA FAX 502-515-6126

John Kolb
Attorney at Law
1930 Bishop Lane
Louisville, KY 40218

re: Health Plan: Benesight
Your Insured: James Ralph Shiftet
Date of Injury: 12-2-02
Event No.: 2643382-2641042

Dear John:

This correspondence confirms my understanding of our telephone conversation of July 13th regarding the potential division of the settlement proceeds from the UM settlement received from the automobile insurance carrier for Ralph Shiftet. We had previously discussed a distribution of \$4,500 to Healthcare Recoveries, \$9,000 to Ralph Shiftet and \$6,500 to myself for attorney's fees and expenses. I agreed to retain the \$20,000 of settlement proceeds in my trust account so that you would have an opportunity to discuss this matter with Healthcare Recoveries and Central Freight.

On July 13, 2004, you advised that Central Freight had rejected the proposed settlement and was now insisting upon receipt of \$10,000 from the insurance carrier providing underinsured motorist coverage to Ralph Shiftet.

Since Central Freight has declined to accept the proposed division of funds, whereby each of the parties received a reduction in the amount they would have received from the settlement, I am advising you that my commitment to retain the \$20,000 settlement proceeds in my trust account is withdrawn as of this date. You are now on notice that that commitment no longer exists.

Very truly yours,

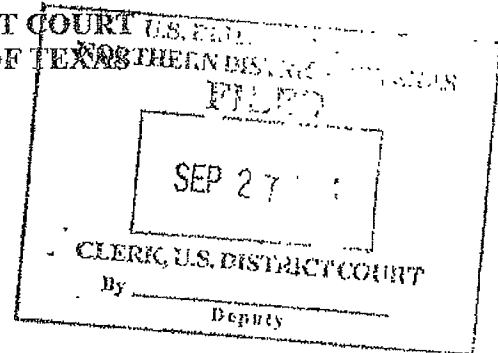

Richard G. Danner, Jr.

RGD/vml
cc: Ralph Shiftet

OF NOV
ORIGINAL

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION



CENTRAL FREIGHT LINES, INC.
(as fiduciary of the CENTRAL FREIGHT
LINES, INC. HEALTH CARE PLAN)

Plaintiff,

CIVIL ACTION

FILE NO. 3:04-CV-1542-K

v.

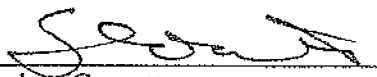
RICHARD DANNER, JR.,
JAMES SHIFLET and UNKNOWN
BANK ABC

NOTICE OF VOLUNTARY DISMISSAL

NOTICE IS HEREBY GIVEN that pursuant to Fed.R.Civ.Pro. 41(a), plaintiff
voluntarily dismisses the above-captioned action without prejudice.

DATED: 9-24-04

SHARPS & ASSOCIATES, PSC


Stephen Gossett
Attorney for Plaintiff

Sterling Plaza
5945 Sherry Lane, Suite 1550
Dallas, Texas 75225
Telephone: (214) 360-0044
Facsimile: (469) 232-0261

EXHIBIT 2

CAUSE NO. D-16-05-0545-CV

WILLIAM NEWBROUGH	§	IN THE DISTRICT COURT
	§	
v.	§	358 TH JUDICIAL DISTRICT
	§	
ANCHOR RISK MANAGEMENT AND	§	
CENTRAL FREIGHT LINES, INC.	§	ECTOR COUNTY, TEXAS

AFFIDAVIT

STATE OF TEXAS §
 §
 COUNTY OF Dallas §

BEFORE ME, the undersigned authority, personally appeared Debora Harvey, who after being sworn, did depose and state as follows:

"My name is Debora Harvey. I am fully competent to make this affidavit. The statements made herein are true and are based on my personal knowledge gained in my employment and personal involvement in this matter.

1. I am a Senior Claims Adjuster for Anchor Risk and Claims Management ("Anchor") and am familiar William Newbrough's ("Newbrough") claim for benefits under Central Freight Lines, Inc.'s ("Central Freight") Occupational Injury Benefit Plan. I was assigned by Anchor to manage Newbrough's claim for personal injuries relating to an accident that occurred on or about June 23, 2015 while he was making a delivery for Central Freight Lines at Smoker's Outlet.

2. Central Freight is a self-insured nonsubscriber to the Texas Workers' Compensation program, and Anchor serves as the third-party administrator for Central Freight's self-insured Occupational Injury Benefit Plan. Anchor is not an insurer. All money paid on behalf of Newbrough for his medical treatment was paid by Central Freight.

3. After his injury, Newbrough began medical treatment in June 2015. He or his healthcare provider submitted his proposed treatment to Anchor. I then obtained approval for the treatment from Central Freight. Between June 2015 and April 2016, I had numerous conversations with Newbrough and his healthcare providers regarding his medical treatment. Newbrough never informed Anchor that he was pursuing damages from Smoker's Outlet

4. On May 12, 2016, I received an anonymous phone call. The caller informed me that Mr. Newbrough was now represented by counsel in connection with the injury for which he had made a claim and that Newbrough's attorney was not going to disclose his representation to Central Freight or Anchor at that time.

5. On May 13, 2016, the adjuster for Republic Group, Smoker's Outlet's insurer, contacted me and requested that I send a subrogation letter with a detailed check register. I sent Republic Group the subrogation letter and check register that same day, May 13, 2016.

6. Neither Newbrough nor his attorney ever contacted me regarding Newbrough's settlement with Smoker's Outlet and Republic Group, and I never made any representations to Newbrough or his attorney regarding any subrogation interest.

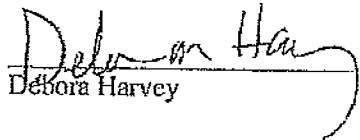
7. At no time did Anchor indicate that it would waive Central Freight's subrogation interest. Anchor never renounced any subrogation interest on behalf of Central Freight or any one else, and at no time did Anchor indicate an intention to waive any such subrogation interest.

8. Attached as Exhibit D to Anchor's Motion for Summary Judgment is a true and correct copy of the letter and check register that I sent to Republic Group on May 13, 2016, with the payee of medical claims redacted due to medical privacy requirements. The letter and check register are a part of the records kept by Anchor in the regular course of business, and it was in the regular course and business for me, as the Senior Claims Adjuster handling the claim, to draft

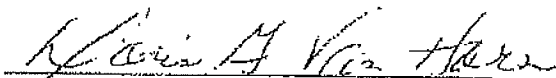
the letter and transmit the letter and check register. The letter and check register were made in the regular course of business at or near the time."

Further, Affiant Sayeth Not.

SIGNED on this the 9 day of March, 2017.


Debora Harvey

9th SUBSCRIBED AND SWORN TO before me, the undersigned Notary Public, on this the day of March, 2017, to certify which witness my hand and seal of office.


Notary Public in and for the State of Texas

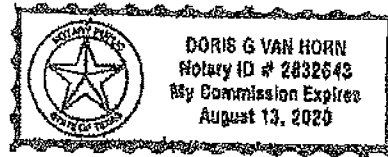


Exhibit B

01/05/2016 10:18

CAX2103664791

P.004/004

STATE OF TEXAS §
COUNTY OF Ector §

**AFFIDAVIT CONCERNING COST AND NECESSITY OF
MEDICAL OR OTHER SERVICES**

BEFORE ME, the undersigned authority, on this day personally appeared
Claudia Jacques, who by me being duly sworn deposes as follows:

"My name is Claudia Jacques. I am over 18 years
of age, of sound mind, capable of making this affidavit, and personally acquainted
with the facts stated below.

I am the person in charge of the PATIENT ACCOUNT RECORDS for
PhyTex Rehab and as such, I am familiar with reasonable and necessary
charges for those services. Attached to this Affidavit are records that provide an
itemized statement for the service and the charge for the service that
PhyTex Rehab provided to The Law Offices of Miller & Bickel on the
date of January 6, 2016. The attached records are a part of this
Affidavit.

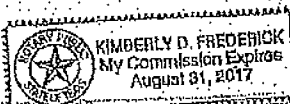
The attached records are kept by PhyTex Rehab in the regular
course of business, and it was the regular course of business of
PhyTex Rehab for an employee or representative of
PhyTex Rehab, with knowledge of the service provided, to
make the record or to transmit information to be included in the record. The
records were made in the regular course of business at or near the time or
reasonably soon after the time the service was provided. The records are the
original or a duplicate of the original.

The services were provided were necessary and the amount charged for the
services were reasonable at the time and place that the services were provided.

The total amount paid for the services was \$ 2509.36 and the amount
currently unpaid but which 545.02 has a right to be paid after any
adjustments or credits is \$ 545.02.

Claudia Jacques
AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME on this, the 6 day of January
2016, by the said Claudia Jacques, Affiant



Kimberly D. Frederick
NOTARY PUBLIC, STATE OF TEXAS

Patient Statement Inquiry

Patient : 24329 - Newbrough, William H

DATE	DESCRIPTION	AMOUNT	BALANCE
09-10-2015		1.00	180.00
		1.00	75.00
		1.00	0.01
		1.00	0.01
09-15-2015		2.00	136.00
		1.00	65.00
		1.00	34.00
09-17-2015		2.00	136.00
		1.00	65.00
		1.00	34.00
09-21-2015		2.00	136.00
		1.00	65.00
		1.00	34.00
09-24-2015		2.00	136.00
		1.00	65.00
		1.00	34.00
09-29-2015		2.00	136.00
		1.00	65.00
		1.00	34.00
10-01-2015		2.00	136.00
		1.00	65.00
		1.00	34.00
10-06-2015		1.00	76.00
		2.00	136.00
		1.00	0.01
		1.00	0.01
10-08-2015		2.00	136.00
		1.00	65.00
		1.00	34.00
10-13-2015		3.00	204.00
		1.00	65.00
		1.00	34.00
10-15-2015		3.00	204.00
		1.00	65.00
		1.00	34.00
10-20-2015		3.00	204.00
		1.00	34.00
10-22-2015		4.00	272.00
		1.00	65.00
11-08-2015	Payment Anchor Claims Management paid 147.77 for DOS 09/15/2015-09/15/2015 via check # 14017, Batch # 110815PTRDEP1SS.		-147.77

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 From RT_5382 By cjacquez

Page 1

Patient Statement Inquiry

Patient : 24329 - Newbrough, William H

DATE	DESCRIPTION	AMOUNT
11-06-2015	Payment Anchor Claims Management paid 147.77 for DOS 09/24/2015-09/24/2015 via check # 14017, Batch # 110615PTRDEP1SS.	-147.77
11-06-2015	Payment Anchor Claims Management paid 147.77 for DOS 09/17/2015-09/17/2015 via check # 14017, Batch # 110615PTRDEP1SS.	-147.77
11-06-2015	Payment Anchor Claims Management paid 150.20 for DOS 09/10/2015-09/10/2015 via check # 14017, Batch # 110615PTRDEP1SS.	-150.20
11-06-2015	Payment Anchor Claims Management paid 147.77 for DOS 09/21/2015-09/21/2015 via check # 14017, Batch # 110615PTRDEP1SS.	-147.77
11-06-2015	Payment Anchor Claims Management paid 147.77 for DOS 09/29/2015-09/29/2015 via check # 14017, Batch # 110615PTRDEP1SS.	-147.77
11-06-2015	Discount Discount of \$87.23 for DOS 09/15/2015-09/15/2015, Batch # 110615PTRDEP1SS.	-87.23
11-06-2015	Discount Discount of \$87.23 for DOS 09/24/2015-09/24/2015, Batch # 110615PTRDEP1SS.	-87.23
11-06-2015	Discount Discount of \$87.23 for DOS 09/17/2015-09/17/2015, Batch # 110615PTRDEP1SS.	-87.23
11-06-2015	Discount Discount of \$84.82 for DOS 09/10/2015-09/10/2015, Batch # 110615PTRDEP1SS.	-84.82
11-06-2015	Discount Discount of \$87.23 for DOS 09/21/2015-09/21/2015, Batch # 110615PTRDEP1SS.	-87.23
11-06-2015	Discount Discount of \$87.23 for DOS 09/29/2015-09/29/2015, Batch # 110615PTRDEP1SS.	-87.23
11-09-2015	97002	75.00
	97110	135.00
	G8884.CK	0.01
	G8885.CH	0.01
11-17-2015	97110	204.00
	97140	130.00
11-19-2015	97110	204.00
	97140	130.00
11-24-2015	97110	204.00
	97140	130.00
11-30-2015	Payment Anchor Claims Management paid 151.06 for DOS 10/20/2015-10/20/2015 via check # 14086, Batch # 113015PTRDEP1JH.	-151.06
11-30-2015	Payment Anchor Claims Management paid 147.77 for DOS 10/01/2015-10/01/2015 via check # 14086, Batch # 113015PTRDEP1JH.	-147.77
11-30-2015	Payment Anchor Claims Management paid 147.77 for DOS 10/08/2015-10/08/2015 via check # 14086, Batch # 113015PTRDEP1JH.	-147.77

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 From: RT_5382 By: cjacquz

Page 2

Patient Statement Inquiry

Patient : 24329 - Newbrough, William H

Date	Type	Description	Units	Amount
11-30-2015	Payment	Anchor Claims Management paid 145.40 for DOS 10/08/2015-10/08/2015 via check # 14086, Batch # 113015PTRDEP1JH.		-145.40
11-30-2015	Payment	Anchor Claims Management paid 191.84 for DOS 10/15/2015-10/15/2015 via check # 14086, Batch # 113015PTRDEP1JH.		-191.84
11-30-2015	Payment	Anchor Claims Management paid 191.84 for DOS 10/13/2015-10/13/2015 via check # 14088, Batch # 113015PTRDEP1JH.		-191.84
11-30-2015	Discount	Discount of \$86.84 for DOS 10/20/2015-10/20/2015, Batch # 113015PTRDEP1JH.		-86.84
11-30-2015	Discount	Discount of \$87.23 for DOS 10/01/2015-10/01/2015, Batch # 113015PTRDEP1JH.		-87.23
11-30-2015	Discount	Discount of \$87.23 for DOS 10/08/2015-10/08/2015, Batch # 113015PTRDEP1JH.		-87.23
11-30-2015	Discount	Discount of \$65.62 for DOS 10/06/2015-10/06/2015, Batch # 113015PTRDEP1JH.		-65.62
11-30-2015	Discount	Discount of \$111.16 for DOS 10/15/2015-10/15/2015, Batch # 113015PTRDEP1JH.		-111.16
11-30-2015	Discount	Discount of \$111.16 for DOS 10/13/2015-10/13/2015, Batch # 113015PTRDEP1JH.		-111.16
12-10-2015	Payment	Anchor Claims Management paid 217.07 for DOS 10/22/2015-10/22/2015 via check # 14126, Batch # 121016PTRDEP1SD.		-217.07
12-10-2015	Discount	Discount of \$119.93 for DOS 10/22/2015-10/22/2015, Batch # 121016PTRDEP1SD.		-119.93
12-16-2015	Payment	Anchor Claims Management paid 213.78 for DOS 11/19/2015-11/19/2015 via check # 14148, Batch # 121616PTRDEP1SD.		-213.78
12-16-2015	Payment	Anchor Claims Management paid 213.78 for DOS 11/17/2015-11/17/2015 via check # 14141, Batch # 121616PTRDEP1SD.		-213.78
12-16-2015	Discount	Discount of \$120.22 for DOS 11/19/2015-11/19/2015, Batch # 121616PTRDEP1SD.		-120.22
12-16-2015	Discount	Discount of \$120.22 for DOS 11/17/2015-11/17/2015, Batch # 121616PTRDEP1SD.		-120.22
		Total Charges on Account:		4485.06
		Total Payments on Account:		-2509.36
		Total Discounts on Account:		-1430.68
		Total Account Adjustments:		0.00
		Total Account Charge Reversals:		0.00
		Account Balance Due:		545.02

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From RT_5382 By cjaquez

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01/05/2016 10:20

(FAX)2103654791

P.004/004

STATE OF TEXAS

COUNTY OF _____

**AFFIDAVIT CONCERNING COST AND NECESSITY OF
MEDICAL OR OTHER SERVICES**

BEFORE ME, the undersigned authority, on this day personally appeared Candace Brown, who by me being duly sworn deposes as follows:

"My name is Candace Brown. I am over 18 years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts stated below.

I am the person in charge of the PATIENT ACCOUNT RECORDS for East University Family Medicine and as such, I am familiar with reasonable and necessary charges for those services. Attached to this Affidavit are records that provide an itemized statement for the service and the charge for the service that East University Family Medicine provided to The Law Offices of Miller & Bickel on the date of 1-23-15 to 8-31-15. The attached records are a part of this Affidavit.

The attached records are kept by East University Family Medicine in the regular course of business, and it was the regular course of business of East University Family Medicine for an employee or representative of East University Family Medicine, with knowledge of the service provided, to make the record or to transmit information to be included in the record. The records were made in the regular course of business at or near the time or reasonably soon after the time the service was provided. The records are the original or a duplicate of the original.

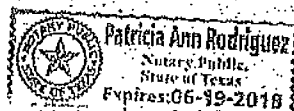
The services were provided were necessary and the amount charged for the services were reasonable at the time and place that the services were provided.

The total amount paid for the services was \$ 645.90 and the amount currently unpaid but which East University Family Medicine has a right to be paid after any adjustments or credits is \$ 0.

Candace Brown
AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME on this, the 11 day of January 2015, by the said Candace Brown, Affiant

Patricia Ann Rodriguez
NOTARY PUBLIC, STATE OF TEXAS



Billing Summary: NEWBROUGH, WILLIAM H #21955 (E#21955)

FIRST PHYSICIANS,
MICHAEL V SHELTON MD
PA

printed 01/12/2016 09:41 AM

MICHAEL V SHELTON MD PA
PO BOX 14704
BELFAST, ME 04915-4042
billing phone: (432) 552-5656

GUARANTOR NAME AND ADDRESS

WILLIAM H NEWBROUGH

PATIENT

PATIENT NAME

WILLIAM H NEWBROUGH

DOB

HOME PHONE

Billing Summary

Claim ID	Procedure	Date of Service	Date of Bill	Pay	Reason	Plan	Supervisor	U.S.	Ins 1	Ins 2	Ins 3
Claim ID 3306											
3306	36415	02/17/2015	02/17/2015	CHARGE	36415	BCBS-TX: BCBS OF TX (PPO)	CHRISTINE WAN	\$18.00			
3306	36415	02/17/2015	02/25/2015	PAYMENT	ACH *****4110	BCBS-TX: BCBS OF TX (PPO)	CHRISTINE WAN	\$-3.00			
3306	36415	02/17/2015	02/25/2015	ADJUSTMENT	CONTRACTUAL (18245)	BCBS-TX: BCBS OF TX (PPO)	CHRISTINE WAN	\$-15.00			
OUTSTANDING								\$0.00	\$0.00	\$0.00	
3306	80053	02/17/2015	02/17/2015	CHARGE	80053	BCBS-TX: BCBS OF TX (PPO)	CHRISTINE WAN	\$76.00			
3306	80053	02/17/2015	02/25/2015	PAYMENT	ACH *****4110	BCBS-TX: BCBS OF TX (PPO)	CHRISTINE WAN	\$-32.30			
3306	80053	02/17/2015	02/25/2015	ADJUSTMENT	CONTRACTUAL (18245)	BCBS-TX: BCBS OF TX (PPO)	CHRISTINE WAN	\$-42.70			
OUTSTANDING								\$0.00	\$0.00	\$0.00	
3306	83718	02/17/2015	02/17/2015	CHARGE	83718	BCBS-TX: BCBS OF TX (PPO)	CHRISTINE WAN	\$37.00			
3306	83718	02/17/2015	02/25/2015	PAYMENT	ACH *****4110	BCBS-TX: BCBS OF TX (PPO)	CHRISTINE WAN	\$-6.16			
3306	83718	02/17/2015	02/25/2015	ADJUSTMENT	CONTRACTUAL (18245)	BCBS-TX: BCBS OF TX (PPO)	CHRISTINE WAN	\$-30.84			
OUTSTANDING								\$0.00	\$0.00	\$0.00	
3306	84443	02/17/2015	02/17/2015	CHARGE	84443	BCBS-TX: BCBS OF TX (PPO)	CHRISTINE WAN	\$65.00			
3306	84443	02/17/2015	02/25/2015	ADJUSTMENT	GLOBAL (37762)	BCBS-TX: BCBS OF TX (PPO)	CHRISTINE WAN	\$-65.00			
OUTSTANDING								\$0.00	\$0.00	\$0.00	
3306	85025	02/17/2015	02/17/2015	CHARGE	85025	BCBS-TX: BCBS OF TX (PPO)	CHRISTINE WAN	\$35.00			
3306	85025	02/17/2015	02/25/2015	ADJUSTMENT	GLOBAL (37762)	BCBS-TX: BCBS OF TX (PPO)	CHRISTINE WAN	\$-35.00			
OUTSTANDING								\$0.00	\$0.00	\$0.00	
3306	99000	02/17/2015	02/17/2015	CHARGE	99000	BCBS-TX: BCBS OF TX (PPO)	CHRISTINE WAN	\$30.00			
3306	99000	02/17/2015	02/25/2015	ADJUSTMENT	GLOBAL (37762)	BCBS-TX: BCBS OF TX (PPO)	CHRISTINE WAN	\$-30.00			
OUTSTANDING								\$0.00	\$0.00	\$0.00	
3306	99213	02/17/2015	02/17/2015	CHARGE	99213	BCBS-TX: BCBS OF TX (PPO)	CHRISTINE WAN	\$130.00			
3306	99213	02/17/2015	02/25/2015	PAYMENT	ACH	BCBS-TX: BCBS	CHRISTINE	\$-41.01			

9306	99213	02/17/2015	02/25/2015	ADJUSTMENT	CONTRACTUAL	OF TX (PPO) BCBS-TX BCBS OF TX (PPO)	CHRISTINE WAN	\$-53.99		
9306	99213	02/17/2015	02/25/2015	TRANSFERIN	DEDUCTIBLE	PATIENT	CHRISTINE WAN	\$-35.00		\$35.00
9306	99213	02/17/2015	02/25/2015	PAYMENT	UNAPPLIED	PATIENT	CHRISTINE WAN			\$-35.00
OUTSTANDING								\$0.00	\$0.00	\$0.00
Claim ID: 28730										
28730	73030	06/23/2015	06/23/2015	CHARGE	73030	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$0.00		
28730	73030	06/23/2015	07/29/2015	PAYMENT	CHECK 13796	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-41.33		
28730	73030	06/23/2015	07/29/2015	ADJUSTMENT	CONTRACTUAL	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-48.67		
OUTSTANDING								\$0.00	\$0.00	\$0.00
28730	99080,73	06/23/2015	06/23/2015	CHARGE	99080,73	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$35.00		
28730	99080,73	06/23/2015	07/29/2015	PAYMENT	CHECK 13706	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-15.00		
28730	99080,73	06/23/2015	07/29/2015	ADJUSTMENT	CONTRACTUAL	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-20.00		
OUTSTANDING								\$0.00	\$0.00	\$0.00
28730	99203	06/23/2015	06/23/2015	CHARGE	99203	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$220.00		
28730	99203	06/23/2015	07/29/2015	PAYMENT	CHECK 13796	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-122.34		
28730	99203	06/23/2015	07/29/2015	ADJUSTMENT	CONTRACTUAL	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-97.66		
OUTSTANDING								\$0.00	\$0.00	\$0.00
28730	A4565	06/23/2015	06/23/2015	CHARGE	A4565	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$30.00		
28730	A4565	06/23/2015	07/29/2015	PAYMENT	CHECK 13706	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-9.19		
28730	A4565	06/23/2015	07/29/2015	ADJUSTMENT	CONTRACTUAL	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-20.81		
OUTSTANDING								\$0.00	\$0.00	\$0.00
Claim ID: 29061										
29061	NONNIDA	06/23/2015	06/26/2015	CHARGE	NONNIDA	CENTRAL FREIGHT	CHRISTINE WAN	\$25.00		
OUTSTANDING								\$25.00	\$0.00	\$0.00
Claim ID: 30906										
30906	99080,73	07/07/2015	07/07/2015	CHARGE	99080,73	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$0.00		
OUTSTANDING								\$0.00	\$0.00	\$0.00
30906	99213	07/07/2015	07/07/2015	CHARGE	99213	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$130.00		
30906	99213	07/07/2015	08/14/2015	PAYMENT	CHECK 13832	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-66.51		
30906	99213	07/07/2015	08/14/2015	ADJUSTMENT	CONTRACTUAL	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-63.49		

								OUTSTANDING	\$0.00	\$0.00	\$0.00
Claim ID 33272											
33272	99080,73	07/20/2015	07/20/2015	CHARGE	99080,73	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$0.00			
								OUTSTANDING	\$0.00	\$0.00	\$0.00
33272	99213	07/20/2015	07/20/2015	CHARGE	99213	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$130.00			
33272	99213	07/20/2015	09/08/2015	PAYMENT	CHECK 13870	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-66.51			
33272	99213	07/20/2015	09/08/2015	ADJUSTMENT	CONTRACTUAL	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-63.49			
								OUTSTANDING	\$0.00	\$0.00	\$0.00
Claim ID 36410											
36410	99080,73	08/04/2015	08/04/2015	CHARGE	99080,73	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$35.00			
36410	99080,73	08/04/2015	09/08/2015	PAYMENT	CHECK 13870	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-15.00			
36410	99080,73	08/04/2015	09/08/2015	ADJUSTMENT	CONTRACTUAL	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-20.00			
								OUTSTANDING	\$0.00	\$0.00	\$0.00
36410	99213	08/04/2015	08/04/2015	CHARGE	99213	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$130.00			
36410	99213	08/04/2015	09/08/2015	PAYMENT	CHECK 13870	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-66.51			
36410	99213	08/04/2015	09/08/2015	ADJUSTMENT	CONTRACTUAL	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-63.49			
								OUTSTANDING	\$0.00	\$0.00	\$0.00
Claim ID 41501											
41501	36415	08/31/2015	08/31/2015	CHARGE	36415	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$20.00			
41501	36415	08/31/2015	11/20/2015	PAYMENT	CHECK 14074	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-4.64			
41501	36415	08/31/2015	11/20/2015	ADJUSTMENT	CONTRACTUAL	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-15.36			
								OUTSTANDING	\$0.00	\$0.00	\$0.00
41501	71020	08/31/2015	08/31/2015	CHARGE	71020	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$98.00			
41501	71020	08/31/2015	11/20/2015	PAYMENT	CHECK 14074	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-41.21			
41501	71020	08/31/2015	11/20/2015	ADJUSTMENT	CONTRACTUAL	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-56.79			
								OUTSTANDING	\$0.00	\$0.00	\$0.00
41501	80053	08/31/2015	08/31/2015	CHARGE	80053	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$75.00			
41501	80053	08/31/2015	11/20/2015	PAYMENT	CHECK 14074	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-18.86			
41501	80053	08/31/2015	11/20/2015	ADJUSTMENT	CONTRACTUAL	ANCHOR CLAIM DEPT - COMBINED	CHRISTINE WAN	\$-56.14			

						GROUP	OUTSTANDING			
41501	81000	08/31/2015	08/31/2015	CHARGE	81000	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$19.00		
41501	81000	08/31/2015	11/20/2015	PAYMENT	CHECK 14074	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-5.60		
41501	81000	08/31/2015	11/20/2015	ADJUSTMENT	CONTRACTUAL	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-13.20		
						OUTSTANDING		\$0.00	\$0.00	\$0.00
41501	85025	08/31/2015	08/31/2015	CHARGE	85025	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$36.00		
41501	85025	08/31/2015	11/20/2015	PAYMENT	CHECK 14074	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-14.03		
41501	85025	08/31/2015	11/20/2015	ADJUSTMENT	CONTRACTUAL	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-20.97		
						OUTSTANDING		\$0.00	\$0.00	\$0.00
41501	85610	08/31/2015	08/31/2015	CHARGE	85610	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$22.00		
41501	85610	08/31/2015	11/20/2015	PAYMENT	CHECK 14074	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-8.77		
41501	85610	08/31/2015	11/20/2015	ADJUSTMENT	CONTRACTUAL	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-15.23		
						OUTSTANDING		\$0.00	\$0.00	\$0.00
41501	85730	08/31/2015	08/31/2015	CHARGE	85730	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$28.00		
41501	85730	08/31/2015	11/20/2015	PAYMENT	CHECK 14074	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-10.64		
41501	85730	08/31/2015	11/20/2015	ADJUSTMENT	CONTRACTUAL	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-17.36		
						OUTSTANDING		\$0.00	\$0.00	\$0.00
41501	93000	08/31/2015	08/31/2015	CHARGE	93000	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$75.00		
41501	93000	08/31/2015	11/20/2015	PAYMENT	CHECK 14074	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-25.48		
41501	93000	08/31/2015	11/20/2015	ADJUSTMENT	CONTRACTUAL	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-49.52		
						OUTSTANDING		\$0.00	\$0.00	\$0.00
41501	99242.25	08/31/2015	08/31/2015	CHARGE	99242.25	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$210.00		
41501	99242.25	08/31/2015	11/20/2015	PAYMENT	CHECK 14074	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-116.08		
41501	99242.25	08/31/2015	11/20/2015	ADJUSTMENT	CONTRACTUAL	ANCHOR CLAIM DEPT - COMBINED GROUP	CHRISTINE WAN	\$-93.92		
						OUTSTANDING		\$0.00	\$0.00	\$0.00
Claim ID 60286	99455	12/01/2015	12/01/2015	CHARGE	99455	CENTRAL FREIGHT	CHRISTINE WAN	\$95.00		
						OUTSTANDING		\$95.00	\$0.00	\$0.00
						TOTAL CHARGE OUTSTANDING AS OF 01/12/2016		\$120.00	\$0.00	\$0.00

01/05/2016 10:22

(FAX) 2103664791

P.004/004

STATE OF TEXAS

COUNTY OF Ector§
§
§AFFIDAVIT CONCERNING COST AND NECESSITY OF
MEDICAL OR OTHER SERVICES

BEFORE ME, the undersigned authority, on this day personally appeared Rose Hawkins, who by me being duly sworn deposes as follows:

"My name is Rose Hawkins. I am over 18 years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts stated below.

I am the person in charge of the PATIENT ACCOUNT RECORDS for Basin Orthopedic, and as such, I am familiar with reasonable and necessary charges for those services. Attached to this Affidavit are records that provide an itemized statement for the service and the charge for the service that Basin Orthopedic provided to The Law Offices of Miller & Bickel on the date of March 2, 2016. The attached records are a part of this Affidavit.

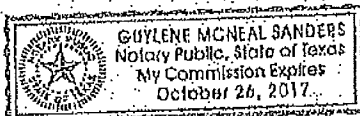
The attached records are kept by Basin Orthopedic in the regular course of business, and it was the regular course of business of Basin Orthopedic for an employee or representative of Basin Orthopedic, with knowledge of the service provided, to make the record or to transmit information to be included in the record. The records were made in the regular course of business at or near the time or reasonably soon after the time the service was provided. The records are the original or a duplicate of the original.

The services were provided were necessary and the amount charged for the services were reasonable at the time and place that the services were provided.

The total amount paid for the services was \$ 4,128.04 and the amount currently unpaid but which Basin Orthopedic has a right to be paid after any adjustments or credits is \$ 0.00.

Rose Hawkins
AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME on this, the 2nd day of March 2016, by the said Rose Hawkins, Affiant.



Guylene McNeal Sanders
NOTARY PUBLIC, STATE OF TEXAS

Basin Ortho Surgical Specialists
 Patient Account History 5/22/2013 To 3/1/2016
 Account : WC7077

Patient : William H Newbrough # WC7077

08/19/15 - Summary

Charges: 408.00
 Adjs: 121.94
 Insurance Payment: 286.06 [09/15/2015, Anchor Claims Management]
 Allowed: 286.06 W/O: 121.94 Copay: 0.00 Deduct: 0.00 Co-ins: 0.00 WH: 0.00 Other: 0.00
 Balance: 0.00

08/19/15 - Financial Details

Service	Diagnoses	Billing Provider	Service Location	Charge Amt.	Ins. Pending	Pat. Due
		Bradley Dyrstad	Basin Orthopedic Surgical Specialists	95.00	0.00	0.00

Payment Type Amount
 Insurance Payment: 42.53 [09/15/2015, Anchor Claims Management]
 Allowed: 42.53 W/O: 52.47 Copay: 0.00 Deduct: 0.00 Co-ins: 0.00 WH: 0.00 Other: 0.00
 Insurance Adjs.: 52.47

		Bradley Dyrstad	Basin Orthopedic Surgical Specialists	25.00	0.00	0.00
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Payment Type Amount
 Insurance Payment: 21.25 [09/15/2015, Anchor Claims Management]
 Allowed: 21.25 W/O: 3.75 Copay: 0.00 Deduct: 0.00 Co-ins: 0.00 WH: 0.00 Other: 0.00
 Insurance Adjs.: 3.75

		Bradley Dyrstad	Basin Orthopedic Surgical Specialists	25.00	0.00	0.00
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Payment Type Amount
 Insurance Payment: 15.00 [09/15/2015, Anchor Claims Management]
 Allowed: 15.00 W/O: 10.00 Copay: 0.00 Deduct: 0.00 Co-ins: 0.00 WH: 0.00 Other: 0.00
 Insurance Adjs.: 10.00

KE' WM Newbrough

99203	840.4726.2	Bradley Dyrstad	Basin Orthopedic Surgical Specialists	175.00	0.00	0.00
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Payment Type	Amount
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Insurance Payment:	163.25	[09/15/2015, Anchor Claims Management]
Allowed: 163.25 W/O: 11.75 Copay: 0.00 Deduct: 0.00 Co-ins: 0.00 WH: 0.00 Other: 0.00		
Insurance Adjs.:	11.75	

	Bradley Dyrstad	Basin Orthopedic Surgical Specialists	88.00	0.00	0.00
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Payment Type	Amount
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Insurance Payment:	44.03	[09/15/2015, Anchor Claims Management]
Allowed: 44.03 W/O: 43.97 Copay: 0.00 Deduct: 0.00 Co-ins: 0.00 WH: 0.00 Other: 0.00		
Insurance Adjs.:	43.97	

08/26/15 - Summary

Charges:	140.00	
Adjs:	15.49	
Insurance Payment:	124.51	[09/24/2015, Anchor Claims Management]
Allowed: 124.51 W/O: 15.49 Copay: 0.00 Deduct: 0.00 Co-ins: 0.00 WH: 0.00 Other: 0.00		
Balance:	0.00	

08/26/15 - Financial Details

Service	Diagnoses	Billing Provider	Service Location	Charge Amt.	Ins. Pending	Pat. Due
		Bradley Dyrstad	Basin Orthopedic Surgical Specialists	25.00	0.00	0.00

Payment Type	Amount
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Insurance Payment:	15.00	[09/24/2015, Anchor Claims Management]
Allowed: 15.00 W/O: 10.00 Copay: 0.00 Deduct: 0.00 Co-ins: 0.00 WH: 0.00 Other: 0.00		
Insurance Adjs.:	10.00	

	Bradley Dyrstad	Basin Orthopedic Surgical Specialists	115.00	0.00	0.00
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Payment Type	Amount
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Insurance Payment:	109.51	[09/24/2015, Anchor Claims Management]
Allowed: 109.51 W/O: 5.49 Copay: 0.00 Deduct: 0.00 Co-ins: 0.00 WH: 0.00 Other: 0.00		
Insurance Adjs.:	5.49	

RE: Wm Newbrough

09/03/15 - Summary

Charges:	115.00
Adjs:	5.49
Insurance Payment:	109.51 [09/25/2015, Anchor Claims Management]
Allowed: 109.51 W/O: 5.49 Copay: 0.00 Deduct: 0.00 Co-ins: 0.00 WH: 0.00 Other: 0.00	
Balance:	0.00

09/03/15 - Financial Details

Service	Diagnoses	Billing Provider	Service Location	Charge Amt.	Ins. Pending	Pat. Due
		Bradley Dyrstad	Basin Orthopedic Surgical Specialists	115.00	0.00	0.00

Payment Type	Amount
Insurance Payment:	109.51 [09/25/2015, Anchor Claims Management]
Allowed: 109.51 W/O: 5.49 Copay: 0.00 Deduct: 0.00 Co-ins: 0.00 WH: 0.00 Other: 0.00	
Insurance Adjs.:	5.49

09/08/15 - Summary

PC: Wm. Newbrough

Charges: 6,571.00
 Adjs: 2,999.04
 Insurance Payment: 3,571.96 [11/19/2015, Anchor Claims Management]
 Allowed: 3,571.96 W/O: 2,999.04 Copay: 0.00 Deduct: 0.00 Co-Ins: 0.00 WH: 0.00 Other: 0.00
 Balance: 0.00

09/08/15 - Financial Details

Service	Diagnoses	Billing Provider	Service Location	Charge Amt.	Ins. Pending	Pat. Due
		Bradley Dyrstad	Odessa Regional Hospital - OP	2,238.00	0.00	0.00

Payment Type Amount
 Insurance Payment: 2,039.02 [11/19/2015, Anchor Claims Management]
 Allowed: 2,039.02 W/O: 198.98 Copay: 0.00 Deduct: 0.00 Co-Ins: 0.00 WH: 0.00 Other: 0.00
 Insurance Adjs.: 198.98

		Bradley Dyrstad	Odessa Regional Hospital - OP	2,687.00	0.00	0.00
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Payment Type Amount
 Insurance Payment: 1,189.11 [11/19/2015, Anchor Claims Management]
 Allowed: 1,189.11 W/O: 1,497.89 Copay: 0.00 Deduct: 0.00 Co-Ins: 0.00 WH: 0.00 Other: 0.00
 Insurance Adjs.: 1,497.89

		Bradley Dyrstad	Odessa Regional Hospital - OP	1,646.00	0.00	0.00
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Payment Type Amount
 Insurance Payment: 343.83 [11/19/2015, Anchor Claims Management]
 Allowed: 343.83 W/O: 1,302.17 Copay: 0.00 Deduct: 0.00 Co-Ins: 0.00 WH: 0.00 Other: 0.00
 Insurance Adjs.: 1,302.17

09/21/15 - Summary

RE: Wm. Newbrough

Charges: 25.00
 Adjs: 10.00
 Insurance Payment: 15.00 [10/16/2015, Anchor Claims Management]
 Allowed: 15.00 W/O: 10.00 Copay: 0.00 Deduct: 0.00 Co-ins: 0.00 WH: 0.00 Other: 0.00
 Balance: 0.00

09/21/15 - Financial Details

Service	Diagnoses	Billing Provider	Service Location	Charge Amt.	Ins. Pending	Pat. Due
		Bradley Dyrstad	Basin Orthopedic Surgical Specialists	25.00	0.00	0.00

Payment Type Amount
 Insurance Payment: 15.00 [10/16/2015, Anchor Claims Management]
 Allowed: 15.00 W/O: 10.00 Copay: 0.00 Deduct: 0.00 Co-ins: 0.00 WH: 0.00 Other: 0.00
 Insurance Adjs.: 10.00

		Bradley Dyrstad	Basin Orthopedic Surgical Specialists	0.00	0.00	0.00
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Insurance Payment: 0.00 [10/16/2015, Anchor Claims Management]
 Allowed: 0.00 W/O: 0.00 Copay: 0.00 Deduct: 0.00 Co-ins: 0.00 WH: 0.00 Other: 0.00

Re: Wm. Newbrough

10/19/15 - Summary

Charges: 25.00
 Adjs: 10.00
 Insurance Payment: 15.00 [11/17/2015, Anchor Claims Management]
 Allowed: 15.00 W/O: 10.00 Copay: 0.00 Deduct: 0.00 Co-ins: 0.00 WH: 0.00 Other: 0.00
 Balance: 0.00

10/19/15 - Financial Details

Service	Diagnoses	Billing Provider	Service Location	Charge Amt.	Ins. Pending	Pat. Due
		Bradley Dyrstad	Basin Orthopedic Surgical Specialists	0.00	0.00	0.00

Insurance Payment: 0.00 [11/17/2015, Anchor Claims Management]
 Allowed: 0.00 W/O: 0.00 Copay: 0.00 Deduct: 0.00 Co-ins: 0.00 WH: 0.00 Other: 0.00

Service	Diagnoses	Billing Provider	Service Location	Charge Amt.	Ins. Pending	Pat. Due
		Bradley Dyrstad	Basin Orthopedic Surgical Specialists	25.00	0.00	0.00

Payment Type Amount
 Insurance Payment: 15.00 [11/17/2015, Anchor Claims Management]
 Allowed: 15.00 W/O: 10.00 Copay: 0.00 Deduct: 0.00 Co-ins: 0.00 WH: 0.00 Other: 0.00
 Insurance Adjs.: 10.00

11/30/15 - Summary

Charges: 0.00
 Adjs: 0.00
 Balance: 0.00

11/30/15 - Financial Details

Service	Diagnoses	Billing Provider	Service Location	Charge Amt.	Ins. Pending	Pat. Due
		Bradley Dyrstad	Basin Orthopedic Surgical Specialists	0.00	0.00	0.00

Totals	Charges	Pat. Pmts.	Ins. Pmts.	Adjs.	Balance	Ins. Pending	Pat. Due
	7,284.00	0.00	4,122.04	3,161.96	0.00	0.00	0.00

EXHIBIT 3

PJC 105.2

FRAUD AND NEGLIGENT MISREPRESENTATION

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PJC 105.2 Instruction on Common-Law Fraud—Intentional Misrepresentation

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Fraud occurs when—

1. a party makes a material misrepresentation, and
2. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion, and
3. the misrepresentation is made with the intention that it should be acted on by the other party, and
4. the other party relies on the misrepresentation and thereby suffers injury.

“Misrepresentation” means—

[Insert appropriate definitions from PJC 105.3A–105.3E.]

B.

COMMENT

When to use. PJC 105.2 should be used in a common-law fraud case if there is a claim of intentional misrepresentation.

Accompanying question, definitions. PJC 105.2 is designed to follow PJC 105.1 and to be accompanied by one or more of the definitions of misrepresentation at PJC 105.3A–105.3E.

Use of “or.” If more than one definition of misrepresentation is used, each must be separated by the word *or*, because a finding of any one type of misrepresentation would support recovery. *See Lundy v. Masson*, 260 S.W.3d 482, 494 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (approving the use of “or”).

Source of instruction. The supreme court has repeatedly identified these elements of common-law fraud. *See, e.g., Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 211 n.45 (Tex. 2002) (identifying the recognized elements of common-law fraud); *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998) (discussing recoverable damages sounding in tort); *Oilwell Division, United States Steel Corp. v. Fryer*, 493 S.W.2d 487, 491 (Tex. 1973) (first announcing the recognized elements of common-law fraud and discussing fraudulent inducement as an affirmative defense).

Reliance. In *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 923, 24 (Tex. 2010), the supreme court explained that “fraud”

REPRESENTATION

FRAUD AND NEGLIGENT MISREPRESENTATION

PJC 105.2

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the plaintiff show actual and justifiable reliance" and held there was no evidence that the plaintiffs had justifiably relied on an audit report because they had knowledge of the company's true condition. *See Grant Thornton LLP*, 314 S.W.3d at 923 (measuring justifiability "given a fraud plaintiff's individual characteristics, abilities, and appreciation of facts and circumstances at or before the time of the alleged fraud") (quoting *Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014, 1026 (5th Cir. 1990)); *see also Ernst & Young, L.L.P. v. Pacific Mutual Life Insurance Co.*, 51 S.W.3d 573, 577 (Tex. 2001). The supreme court has rejected the argument that a party's failure to use due diligence bars a claim of fraud. *See Koral Industries v. Security-Connecticut Life Insurance Co.*, 802 S.W.2d 650, 651 (Tex. 1990); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 933 (Tex. 1983) (defendant in fraud case cannot complain that plaintiff failed to discover truth through exercise of care).

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EXHIBIT 4

STATE OF TEXAS §
 §
COUNTY OF ECTOR §

AFFIDAVIT OF MARK A. CEVALLOS

BEFORE ME, the undersigned authority, on this day personally appeared MARK A. CEVALLOS, who being by me duly sworn stated upon his oath as follows:

“My name is MARK A. CEVALLOS. I am over the age of eighteen, and I am fully competent to make this Affidavit. The statements contained in this Affidavit are within my personal knowledge and true and correct.

Attached to this affidavit are 27 pages of documents from the file of William Newbrough in Cause No. D-16-05-0545-CV, pending in the 358th District Court, Ector County, Texas.

All of these records are kept by me in the ordinary course of business, with personal knowledge of the act, event or condition recorded to make the memorandum or record or to transmit information thereof to be included in such memorandum of record; and the memorandum or record was made at or near the time of the act, event, condition, opinion or diagnosis recorded or reasonably soon thereafter. The records attached hereto are exact duplicates of the original, and it is a rule of the office of Miller & Bicklein, to not permit the original records to leave the office.

I am one of the attorneys representing William Newbrough in this lawsuit.

In September 2016 our office was retained to represent Mr. Newbrough in claims for injuries he sustained while working for Central Freight on the premises of Smoker's Outlet in Odessa, Texas. This injury occurred on June 18, 2015. On September 2, 2015 we sent a letter putting Smoker's Outlet on notice of his claims against Smoker's Outlet and copied Anchor Risk Management.

The only party I ever received any response from was the Republic Group, which was the insurer of Smoker's Outlet. I never received a response from Anchor.

In December of 2015 I was asked by James Rushing, the adjuster for Republic Group, to present Mr. Newbrough for a statement. I agreed to allow Newbrough's statement to be taken. I told Rushing that Newbrough was still treating and recovering from his shoulder surgery and that when he was done I would put a demand packet together for him which included all the medical records.

On March 22, 2016 I put together a demand packet which included all the medical records and sent it to Rushing. In April, after reviewing the demand packet, Rushing asked me to allow him to take an additional statement from Newbrough because the first one did not record. In fact, when he asked Rushing had forgotten he had taken the statement at all.

On April 20, 2016 I presented Newbrough for statement a second time. During that statement Rushing forwarded to me two photographs of the premises at Smoker's Outlet that he intended to question Newbrough about. After Rushing was finished questioning Newbrough he explained that he would continue his evaluation and make an offer.

During the end of April and middle of May of 2016 Rushing and I had several phone conversations regarding Newbrough's claims. He eventually told me his top offer was \$35,000. On or about May 12 I spoke with Newbrough who gave me authority to accept the offer. I sent an email on May 12 to Rushing and asked him to call me as a result of what I discussed with Newbrough.

When I spoke on the phone with Rushing on May 13, 2016 about my intention to accept the offer Rushing asked me if I would draft and send him a quick letter which indemnified Republic for liens and/or subrogation interests. In this conversation he said that he just needed it for his file so his supervisor would know he had asked.

I sent the indemnification letter back the same day by email. Rushing responded within an hour and asked for my tax i.d. number.

On May 19, 2016 Rushing sent to me the release document which I told him I would have executed and sent back the same day. On May 20, 2016 Newbrough executed the release and I forwarded it to him.

On May 23 for the first time I heard from Rushing that he had been contacted by someone from Anchor who was "saying they are the WC provider". I understood "WC" to mean "workers' compensation".

Rushing then sent to me the settlement check which was made payable to our office and Newbrough only. This check has never been negotiated.

We next filed this lawsuit seeking a declaratory judgment that Anchor had waived its interest by never asserting any subrogation interest to my office or to Republic until after the settlement agreement had been returned.

In the motion for summary judgment filed by Anchor it is clear that at the time

Rushing asked me for an indemnification he had already initiated contact with Anchor. Rushing then told me by email after the release had been returned that *he* had been contacted by Anchor, which turns out to be the opposite based on the documents attached to Anchor's motion.

After putting Anchor on notice I have, to this day, never been contacted by Anchor nor has Anchor asserted any right of reimbursement to me.

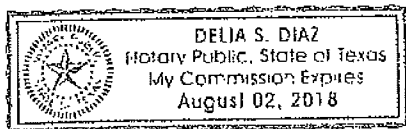
Because Central Freight was not a subscriber to the Texas Workers' Compensation Act there was no statutory lien for Anchor to assert. By failing to assert their interest after we put Anchor on notice, it was my opinion that they had waived their lien, and was not intending to pursue it. I proceeded to settle the claim with Smoker's Outlet.

Had Anchor ever put me on notice I would not have done so. Had Rushing told me that he had been in contact with Anchor prior to Newbrough executing the release we would not have settled Newbrough's claim. Because Anchor and Rushing, after communicating with each other, failed to disclose said communication to me, Newbrough executed the agreement he otherwise would not have. No one advised me of a letter from Anchor to Republic asserting this alleged subrogation interest.

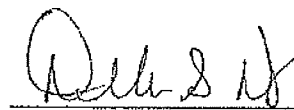
Anchor and Republic have clearly hidden and secreted the subrogation demand from me prior to any settlement. It is now clear that I acted upon a set of facts as represented by both and specifically by Republic that no demand was ever made. This concealment was fraudulent and led me to have a client execute a settlement all the while both Anchor and Republic knew facts had been misrepresented."


MARK A. CEVALLOS

SUBSCRIBED AND SWORN TO BEFORE ME on this 20th day of April, 2017 to
certify which witness my hand and seal of office.



#128344852


Notary Public Signature

LAW OFFICES OF
MILLER & BICKLEIN

4555 East University Blvd., Suite D5
Odessa, Texas 79762
(432) 550-3006
(432) 362-4624 (fax)

4920 South Loop 289, Suite 103 A
Lubbock, Texas 79414
(806) 780-4357
(806) 780-4358 (fax)

8207 Callaghan Road, Suite 250
San Antonio, Texas 78230
(210) 366-2400
(210) 366-4791 (fax)

May 13, 2016

Via email

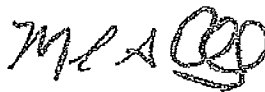
James Rushing
Republic Group
PO Box 809056
Dallas, Texas 75380-9056

Re:	Our Client	:	William Newbrough
	D/Accident	:	6/23/2015
	Claim No.	:	08CPP0802904
	Insured	:	Smoker's Outlet, Inc.

Dear Mr. Rushing:

With regard to the above matter, in reference to any settlement between the parties, both myself and the Law Offices of Miller & Bicklein will indemnify any and all liens or subrogation interests, whether known or unknown, arising from the medical treatment received by Mr. Newbrough for injuries sustain in the incident made the basis of this claim.

Sincerely,



MARK A. CEVALLOS

MAC/



The Law Offices of
MILLER & BICKLEIN, P.C.

September 2, 2015

CM: 7014 3490 0000 3271 8913
& Reg. Mail

Smokers Outlet
Attn: Store Manager
2604 N. Grandview Ave., Ste A
Odessa, Texas 79761

Re: Our Client : William Newbrough
 D/Accident : 06/18/15

Dear Sir/Madam:

Please be advised that **THE LAW OFFICES OF MILLER & BICKLEIN** represent William Newbrough for injuries sustained on June 18, 2015.

This letter is being provided to you as notice of this claim so that you may properly advise your insurance carrier. If you were covered by a policy of liability insurance at the time of the incident, please forward this notice letter to them. If you do not, they may deny coverage for failing to comply with the "notice" provisions of your policy. If you did not have a policy of insurance in effect at the time of the incident, please give me a call to discuss your options.

Please direct all future communications to this office and we ask that you make no attempt to contact our client.

Should you have any questions, please do not hesitate to contact our office.

Sincerely,


Mark A. Cevallos

MAC/dsd

4555 E. University, Ste D5 Odessa, TX 79762 (432) 550-3006 Phone (432) 362-4624 Fax	8207 Callaghan Road, Suite 250 San Antonio, TX 78230 (210) 366-2400 Phone (210) 366-4791 Fax	4920 S. Loop 289, Ste 103A Lubbock, TX 79414 (806) 780-4357 Phone (806) 780-4358 Fax	500 Chestnut, Suite 213 Abilene, TX 79602 (325) 437-5785 Phone (325) 437-5786 Fax
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<http://mblaw.org>

Cc:

Anchor Claims Management
14785 Preston Rd. #350
Dallas, Texas 75254

4555 E. University, Ste D5 Odessa, TX 79762 (432) 550-3006 Phone (432) 362-4624 Fax	8207 Callaghan Road, Suite 250 San Antonio, TX 78230 (210) 366-2400 Phone (210) 366-4791 Fax	4920 S. Loop 289, Ste 103A Lubbock, TX 79414 (806) 780-4357 Phone (806) 780-4358 Fax	500 Chestnut, Suite 213 Abilene, TX 79602 (325) 437-5785 Phone (325) 437-5786 Fax	http://mblaw.org
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STATE OF TEXAS

COUNTY OF Ector§
§
§

AFFIDAVIT OF MEDICAL RECORDS

Before me, the undersigned authority, personally appeared Rose Hawkins, who, being duly sworn deposed as follows:

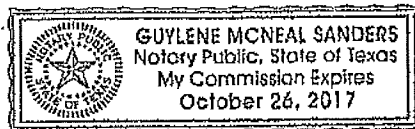
My name is Rose Hawkins, I am of sound mind, capable of making this affidavit, and personally acquainted with these facts herein stated:

I am the custodian of records for Basin Orthopedic Surg. Spec., attached hereto are 81 pages of Medical Records. These said pages are kept in the regular course of business, and it was in the regular course for an employee or representative of Basin Orthopedic Surg Spec with knowledge of the act, event, condition, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonable soon thereafter.

The records attached hereto are originals or exact duplicates of originals and nothing has been removed from the original files before making copies.

Rose Hawkins
Custodian of Records

SWORN TO AND SUBSCRIBED before me on this 2nd day of March, 2017.



Guylene McNeal Sanders
NOTARY PUBLIC, STATE OF Texas
My Commission Expires: 10/26/2017

BASIN ORTHOPEDIC SURGICAL SPECIALISTS, P.A.

Medical History Form

(Please use black ink)

Patient Name: William H Newbrough Appointment Date: 8-19-15 with Dr. DynstadAge: 60 Sex: ☐ F ☒ M Height: 5'9" Weight: _____ Dominant hand: ☐ R ☒ L Did you bring X-rays? ☐ Y ☒ NWho is your primary physician? (Name): Pete Tenatsch ☐ MD ☒ PA Date last seen? 8-7-15What is the reason for this visit? ☐ Pain ☐ Numbness ☐ Weakness ☐ Swelling ☐ Stiffness ☒ Other _____Latex Allergy? ☐ Y ☒ N

What body part is involved? (Please mark the table below)

Shoulder	Elbow	Wrist	Hand	Hip	Knee	Ankle	Foot	Neck	Back
<input checked="" type="checkbox"/> R <input type="checkbox"/> L	<input type="checkbox"/> R <input type="checkbox"/> L	<input type="checkbox"/> R <input type="checkbox"/> L	<input type="checkbox"/> R <input type="checkbox"/> L	<input type="checkbox"/> R <input type="checkbox"/> L	<input type="checkbox"/> R <input type="checkbox"/> L	<input type="checkbox"/> R <input type="checkbox"/> L	<input type="checkbox"/> R <input type="checkbox"/> L	<input type="checkbox"/>	<input type="checkbox"/>

How long ago did it start? _____ Days _____ Weeks _____ Months 5-18-15 Years Have you had a problem like this before? ☐ Y ☒ NIn this section, check the ONE BOX which best describes how your problem started. Then answer the questions below the box you checked. Use as much space to the right as needed.☐ NO INJURY (or onset was: ☐ Gradual or ☒ Sudden)

Please indicate why you think it started?

Comments:

☒ INJURY ☐ Accident ☐ Sport ☐ Auto AccidentDate: 5-18-15Please specify where & how it happened. 5-18-15 behind smoker's outletWhat sport? work School? _____☒ INJURY AT WORKFrom a: ☐ Lift ☐ Twist ☒ Fall ☐ Bend ☐ Pull ☐ Reach☐ WORK RELATED (But NO INJURY)Date: 5-18-15

How did your job cause the problem?

On a scale of 0-10 (10 is the worst) how severe is your pain? (circle) 10 1 2 3 4 5 6 7 8 9 10What is the quality of the pain? ☐ Sharp ☒ Dull ☐ Stabbing ☐ Throbbing ☐ Aching ☐ BurningThe pain is: ☐ Constant ☒ Comes and goes (intermittent)Does your pain wake you from your sleep? ☐ Y ☒ NDo you have: ☐ Swelling ☐ Bruises ☐ Numbness ☐ Tingling ☒ Weakness ☐ Loss of control of bowel or bladder☐ Locking/Catching ☐ Giving waySince my problem started, it is: ☒ Getting better ☐ Getting worse ☐ UnchangedWhat makes your symptoms worse? ☐ Standing ☐ Walking ☒ Lifting ☐ Exercise ☐ Twisting ☐ Lying in bed ☐ Bending ☐ Squatting☐ Kneeling ☐ Stairs ☐ Sitting ☐ Coughing ☐ SneezingWhat makes your symptoms better? ☐ Rest ☐ Elevation ☐ Ice ☐ Heat ☐ Other: Pain medicationWhat medications are you taking now? LYSAPROL - Lovastatin - Hydralazine 10-3-25ALLERGIC TO ANY MEDICATIONS? ☐ Y ☒ N If yes, please list and describe reactions: _____Have you had any of these treatments? Injection: ☐ Y ☒ N Brace: ☐ Y ☒ N Physical Therapy: ☒ Y ☐ N Cane/Crutchi: ☐ Y ☒ NWere you seen in the E.R. for this problem? ☒ Y ☐ N If yes, which E.R.? NA Date: _____Are you here today as a result of an E.R. visit? ☒ Y ☐ N Who saw you in the E.R.? _____ ☐ MD ☐ PA

What test/scans have you had for this problem?

☒ X-Rays ☒ MRI ☐ CAT Scan ☐ Bone Scan ☐ Nerve Test (EMG/NCV) Where? west Texas imagingHave you already had surgery for a problem in this same area either recently or in the past? ☐ N ☐ Y

Please list below:

Procedure #1	Surgeon:	City:	Date:
Procedure #2	Surgeon:	City:	Date:

Current work status? ☐ Regular ☒ Light duty - (how long? Since it) ☐ Not working due to this problem☐ Disabled ☐ Retired ☐ StudentWhen is the last date you worked your regular job? 8-17-15Are you currently receiving or plan to apply for: Disability: ☐ Y ☒ N Worker's Comp: ☒ Y ☐ N Unemployment: ☐ Y ☐ N

BASIN ORTHOPEDIC SURGICAL SPECIALISTS, P.A.
REVIEW OF SYSTEMS

Patient Name: William Newbrough

Have you had a prior problem with this same Orthopedic condition in the past? ☒ N ☐ Y (Explain below)

Do your other joints have: ☐ Morning stiffness lasting over 30 minutes ☐ Joint pain or swelling ☒ Back Pain ☐ Gout
☐ Rheumatoid arthritis ☐ Osteoporosis ☐ Prior fracture (which bone) ☐ None of these

Have you had any of these symptoms? If no, mark NONE

- | | | NONE | YEAR | Details/Comments |
|---------------------------|---|------------|------|------------------|
| 1. GI | <input type="checkbox"/> Heartburn, ulcers <input type="checkbox"/> Nausea, Vomiting <input type="checkbox"/> Blood in stool <input type="checkbox"/> | <u>N/A</u> | | |
| | <input type="checkbox"/> Hepatitis <input type="checkbox"/> Liver Disease | | | |
| 2. ENDO | <input type="checkbox"/> Thyroid Disease <input type="checkbox"/> Heat or Cold Intolerance | <u>N/A</u> | | |
| 3. CON | <input type="checkbox"/> Weight Loss <input type="checkbox"/> Loss of Appetite | <u>N/A</u> | | |
| 4. EYE | <input type="checkbox"/> Blurred Vision <input type="checkbox"/> Double Vision <input type="checkbox"/> Vision Loss <input type="checkbox"/> | <u>N/A</u> | | |
| 5. ENT | <input type="checkbox"/> Hearing Loss <input type="checkbox"/> Hoarseness <input type="checkbox"/> Trouble Swallowing | <u>N/A</u> | | |
| 6. CV | <input type="checkbox"/> Chest Pain <input type="checkbox"/> Palpitations | <u>N/A</u> | | |
| 7. RS | <input checked="" type="checkbox"/> Chronic Cough <input checked="" type="checkbox"/> Shortness of Breath | <u>N/A</u> | | |
| 8. GU | <input type="checkbox"/> Painful Urination <input type="checkbox"/> Blood in Urine <input type="checkbox"/> Kidney Problems | <u>N/A</u> | | |
| 9. SK | <input type="checkbox"/> Frequent Rashes <input type="checkbox"/> Skin Ulcers <input type="checkbox"/> Lumps <input type="checkbox"/> Psoriasis | <u>N/A</u> | | |
| 10. NEU | <input type="checkbox"/> Headaches <input checked="" type="checkbox"/> Dizziness <input type="checkbox"/> Seizures | | | |
| 11. PSY | <input type="checkbox"/> Depression <input type="checkbox"/> Drug/Alcohol Addiction <input checked="" type="checkbox"/> Sleep Disorder | | | |
| 12. HEM | <input type="checkbox"/> Easy Bleeding <input type="checkbox"/> Easy Bruising <input type="checkbox"/> Anemia | <u>N/A</u> | | |
| 13. ARE YOU HIV POSITIVE? | <input checked="" type="checkbox"/> N <input type="checkbox"/> Y | | | |

PAST MEDICAL HISTORY

Are you Diabetic? ☒ N ☐ Y If yes, treatment? ☐ Insulin ☐ Oral Meds ☐ Diet ☐ None

Are you taking or have you ever taken blood thinners? ☒ N ☐ Y If Yes, which one?

Past Surgical History: What operations have you had and when? Please list:

none

Have you or a family member ever had a reaction to anesthesia? ☒ N ☐ Y EXPLAIN:

Past Hospitalizations: (Not for surgery):

None

Have you ever had: ☐ Heart attack (Year _____) ☒ High Blood Pressure ☐ Blood Clots (Year _____) ☐ Stroke ☐ Heart Failure

☐ Ankle Swelling ☐ Kidney Failure ☐ Cancer (Type/location _____)

☐ Stomachache while taking anti-inflammatories (includes Advil/Aleve/Motrin). If yes, what anti-inflammatories have you already had a problem with? none

☐ I do not have any of the above conditions.

FAMILY HISTORY: Have any direct relatives had any of the following disorders? If so, which relative?

☒ Diabetes Mother/Brother ☐ High Blood Pressure Mother/Brother ☒ Rheumatoid Arthritis Mother/Brother ☐ NONE

Do any direct relatives have the same condition you are being seen for today? ☐ Y ☒ N

SOCIAL HISTORY:

Do you use tobacco? ☐ N ☒ Y If yes, packs per day? 1 1/2 How many years? 40 Patient informed of smoking risk? ☒ Y

Alcohol use? ☒ N ☐ Y If yes, how often? ☐ Daily ☐ Other _____/week Marital History: ☒ M ☐ F ☐ S ☐ D ☐ W

How many people live with you? Self
Occupation: Truck Driver Central Employer:

Do you plan to be working 6 months from now? ☒ Y ☐ N

PLEASE SIGN: The information on this/these form(s) is accurate to the best of my knowledge.

Signature

Date

FOR OFFICE USE ONLY:

Completed

Date

Review #1 by

MD Date:

Review #2 by

MD Date:

From: Combined Group To: 14323370910 Page: 1/39 Date: 8/28/2015 9:04:41 AM



ANCHOR RISK MANAGEMENT

A Combined Group Solution

FAX Coverpage

Date: Friday, August 28, 2015 9:04:38 AM

From: Debora Harvey,

To:

Re: William Newbrough

Attention Mary A.:

The surgical procedure of Left shoulder arthroscope with rotator cuff repair with subacromial decompression and possible biceps tenotomy to occur at Odessa Regional; is approved as reasonable and necessary.

Thanks so much,

Debora Harvey
Claims Adjuster

Thank you,
Debora Harvey,
Phone: 214.295.1540
Fax: 214.295.1700
Email: DHarvey@combinedgroup.com

14785 Preston Rd., #350 Dallas, Texas 75254

phone: 214.295.1600 / 800.275.3193

fax: 214.295.1700 / 800.275.3194

www.anchor-risk.com



**FIRST
PHYSICIANS**

Date: _____

Appendix 328

NEWBROUGH, WILLIAM H (id #21955, dob: 03/07/1955)

Consult Orders

This fax may contain legally privileged health information and is intended for the sole use of the intended recipient. You are hereby notified that the disclosure, or other unlawful use of this health information is prohibited.

If you received this fax in error visit www.athenahealth.com/NotMyFax to notify the sender and confirm that the information will be destroyed. If you do not have internet access, please call 1-888-482-8436 to notify the sender and confirm that the information will be destroyed. [ID:331818-H-10019]

Referral Order

08/06/2015

To Provider	From Provider
STEVEN RILEY MD 1340 E 7TH ST ODESSA, TX 79761-5423 Phone: Phone: (432) 332-2663 Fax: Fax: (432) 337-0910	PETER J. IENAT SCH, PA EAST UNIVERSITY MAIN OFFICE 3051 E UNIVERSITY BLVD ODESSA, TX 79762-7902 Phone: (432) 362-4376 Fax: (432) 362-6308

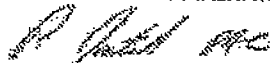
Referral Order Information

Diagnosis	Full thickness rotator cuff tear ICD-9: 727.61: Complete rupture of rotator cuff
Order Name	Orders included: 1 Full thickness rotator cuff tear ICD-9: 727.61: Complete rupture of rotator cuff • ORTHOPAEDIC REFERRAL Schedule Within: provider's discretion
Notes	

Patient Information

Patient Name	NEWBROUGH, WILLIAM H
Sex DOB Age	M 03/07/1955 60 YR
Address	5715 N TOM GREEN ODESSA, TX 79762
Phone	H: (432) 557-8730 W: (432) 337-1502 M: (432) 557-8730
Primary Insurance	BCBS-TX: BCBS OF TX (PPO) ID: ZGP839805730 Group: 040546 Policy Holder: NEWBROUGH, WILLIAM H
Secondary Insurance	None recorded.

Electronically Signed by: PETER J. IENAT SCH, PA, PA-C



PETER J. IENAT SCH, PA

447137 2015 000 21110 FAX 432 550 8849 BASIN Orthopedic Surgery

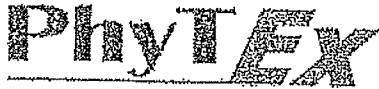
07/14/2015

4325504715

Phytex

16:21:02 09-11-2015

2/4



Rehabilitation & Sports Medicine Associates

2525 N. Grandview Ave.

Ste. 400

Odessa, TX USA 79761

Phone: (432) 550-4700 Fax: (432) 550-4715

Acct #: 24329
 Patient: William H. Newbrough
 DOB: Mar 09, 1955
 Physician: Brad Dyrstad MD
 Phys Fax: (432) 335-8849
 Physician: Not Specified
 Clinician: David Godino
 FSC: Workers Compensation
 Case Mgr:
 Payor: LIBERTY MUTUAL
 Pol/Claim#:

Visit Date: Nov 09, 2015
 Phys Phone: (432) 332-2663
 SSN: XXX-XX-XXXX
 Inj. Date: Jun 23, 2015
 Surg. Date: Sep 08, 2015
 Visits: 14
 Cx/Vis: 0

Employer: Central
 Insured:

Plan of Care

Diagnoses

Left Shoulder

S46.012S

727.61

Strain of muscle(s) and tendon(s) of the rotator cuff of left shoulder, sequela
 Complete rupture of rotator cuff

Assessment

In my professional opinion, this client requires skilled physical therapy in conjunction with a home exercise program to address the problems and achieve the goals outlined below. Overall rehabilitation potential is excellent. The expected length of this episode of skilled therapy services required to address the patient's condition is estimated to be 8 weeks. The patient and/or family were educated regarding their diagnosis, prognosis and related pathology. The client exhibits good understanding and performance of the therapeutic activity and instructions outlined in this skilled rehabilitation session.

Functional Limitations: Primary: Current Status (Report at IE, Re-Eval, 10th visit): Activities and Participation (PT/OT): Carrying, Moving, & Handling Objects:

- 40% to less than 60% impaired

Units: 1, Measure Instrument I: DASH, Assessment Method: Clin
 Judg & Msmt

Functional Limitations: Primary: Goal Status (Report at IE, Re-Eval, 10 visit, DC): Activities and Participation (PT/OT): Carrying, Moving, & Handling Objects:

- 0% Impaired

Units: 1

Impairments Identified:

- ADL Function, ADL's, Body Mechanics, Endurance, Fatigue, Flexibility, Functional Activities, Joint Integrity/Mobility, Motor Function, Muscle Performance, Pain, Posture, Range of Motion, Recreational Activities, Soft Tissue Mobility, Stiffness, Strength, Swelling, Weakness, Work Capacity.

Tolerance:

- Pt demonstrating improved AROM in all planes, Most limitations demonstrating in AROM and PROM abduction.

Treatment Emphasis to focus on:

- Pain relief, Postural Improvements, Range of Motion/Mobility Improvements, Muscle Function Improvements, Sensation Normalization, Neurovascular Improvements, Proprioception/Balance Improvements, Enhanced Dynamic Stability, Strengthen Disease Components, Teach Precautions, Education.
- Controlling and Normalizing:
 - Mobility, Weakness, Instability, Pain, Swelling/Edema.
- Maximizing function related to:
 - ADL's, Work performance, Recreational activity, Athletic activity, Functional activities.

Problems & Goals

Problem #1 Chief Complaint: Pain: Severity at Worst: 5/10.

Please sign and return

I have reviewed this Plan of Care and certify that the skilled therapy services identified are required to meet the patient's need. Comments and/or revisions to this Plan of Care are noted below.

Comments/Revisions

Physician/NP Signature

Date

Print Name and Credentials

Document ID: 00202763.017

David Godino, PT (TX Lic: 1200300)

Status: Signed off (secure electronic signature)

Page 1 of 3

Mark Cevallos

From: Mark Cevallos
Sent: Friday, May 13, 2016 10:48 AM
To: 'Rushing, James'
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC
Attachments: ltr indemnify for liens.pdf

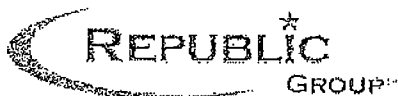
James:

Here's your indemnification letter. Let's get this settled for \$35,000 and get this file off both our desks.

Mark A. Cevallos
Miller & Bickel

From: Rushing, James [<mailto:James.Rushing@RepublicGroup.com>]
Sent: Wednesday, April 20, 2016 3:22 PM
To: Mark Cevallos
Subject: CPP0802904 SMOKER'S OUTLET, INC

James Rushing
Claims Representative
Republic Group
P.O. Box 809066
Dallas, TX 75380
Phone Number: 972-788-6788
Fax Number: 1-888-224-5874
James.Rushing@RepublicGroup.com



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Mark Cevallos

From: Mark Cevallos
Sent: Thursday, May 12, 2016 1:40 PM
To: Rushing, James
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

James:

Please give me a call back about this one. I have spoke with my client and I'd like to get it resolved this week.

Mark

From: Rushing, James [<mailto:James.Rushing@RepublicGroup.com>]
Sent: Wednesday, April 20, 2016 3:22 PM
To: Mark Cevallos
Subject: CPP0802904 SMOKER'S OUTLET, INC

James Rushing
Claims Representative
Republic Group
P.O. Box 809056
Dallas, TX 75380
Phone Number: 972-788-6788
Fax Number: 1-888-224-5874
James.Rushing@RepublicGroup.com



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Mark Cevallos

From: Rushing, James <James.Rushing@RepublicGroup.com>
Sent: Monday, May 23, 2016 1:44 PM
To: Mark Cevallos
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC .

No we have a deal.

James Rushing
Claims Representative
Republic Group
P.O. Box 809056
Dallas, TX 75380
Phone Number: 972-788-6788
Fax Number: 1-888-224-5874
James.Rushing@RepublicGroup.com



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From: Mark Cevallos [<mailto:Mark@mblaw.org>]
Sent: Monday, May 23, 2016 12:21 PM
To: Rushing, James
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

James:

You're right. But this isn't Workers Compensation. Central Freight is NOT a subscriber to Texas Workers' Compensation.

So, are you saying we don't have a deal?

Mark

From: Rushing, James [<mailto:James.Rushing@RepublicGroup.com>]
Sent: Monday, May 23, 2016 12:20 PM
To: Mark Cevallos
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

My supervisor stated in Texas Worker Comp is automatic lien.

James Rushing
Claims Representative

Republic Group
P.O. Box 809056
Dallas, TX 75380
Phone Number: 972-788-6788
Fax Number: 1-888-224-5874
James.Rushing@RepublicGroup.com



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From: Mark Cevallos [<mailto:Mark@mblaw.org>]
Sent: Monday, May 23, 2016 12:06 PM
To: Rushing, James
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

thanks

From: Rushing, James [<mailto:James.Rushing@RepublicGroup.com>]
Sent: Monday, May 23, 2016 12:05 PM
To: Mark Cevallos
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

Yes sir,

James Rushing
Claims Representative
Republic Group
P.O. Box 809056
Dallas, TX 75380
Phone Number: 972-788-6788
Fax Number: 1-888-224-5874
James.Rushing@RepublicGroup.com



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From: Mark Cevallos [<mailto:Mark@mblaw.org>]
Sent: Monday, May 23, 2016 11:59 AM

To: Rushing, James
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

James:

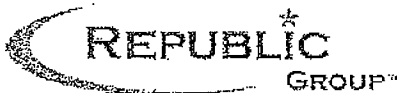
My office received a \$5,000 check for Med Pay. I'm assuming a separate check for \$35,000 is on the way?

Mark

From: Rushing, James [<mailto:James.Rushing@RepublicGroup.com>]
Sent: Thursday, May 19, 2016 2:49 PM
To: Mark Cevallos
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

ok

James Rushing
Claims Representative
Republic Group
P.O. Box 809056
Dallas, TX 75380
Phone Number: 972-788-6788
Fax Number: 1-888-224-5874
James.Rushing@RepublicGroup.com



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From: Mark Cevallos [<mailto:Mark@mblaw.org>]
Sent: Thursday, May 19, 2016 2:49 PM
To: Rushing, James
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

James:

I'll get this executed and back to you tomorrow.

Thanks,

Mark

From: Rushing, James [<mailto:James.Rushing@RepublicGroup.com>]
Sent: Thursday, May 19, 2016 2:29 PM
To: Mark Cevallos
Subject: CPP0802904 SMOKER'S OUTLET, INC

James Rushing

Claims Representative

Republic Group

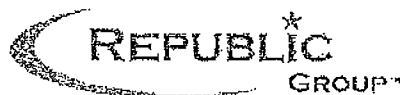
P.O. Box 809056

Dallas, TX 75380

Phone Number: 972-788-6788

Fax Number: 1-888-224-5874

James.Rushing@RepublicGroup.com



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/Mark Cevallos

From: Rushing, James <James.Rushing@RepublicGroup.com>
Sent: Monday, May 23, 2016 1:49 PM
To: Mark Cevallos
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

Some lady called from that insurance company Anchor Risk Management, saying they were the WC provider. Called my supervisor

James Rushing
Claims Representative
Republic Group
P.O. Box 809056
Dallas, TX 75380
Phone Number: 972-788-6788
Fax Number: 1-888-224-5874
James.Rushing@RepublicGroup.com



WHERE RELATIONSHIPS MATTERSM

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From: Mark Cevallos [<mailto:Mark@mblaw.org>]
Sent: Monday, May 23, 2016 1:45 PM
To: Rushing, James
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

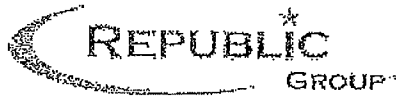
Made me nervous there for a second.

From: Rushing, James [<mailto:James.Rushing@RepublicGroup.com>]
Sent: Monday, May 23, 2016 1:44 PM
To: Mark Cevallos
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

No we have a deal.

James Rushing
Claims Representative
Republic Group
P.O. Box 809056
Dallas, TX 75380
Phone Number: 972-788-6788
Fax Number: 1-888-224-5874

James.Rushing@RepublicGroup.com



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From: Mark Cevallos [<mailto:Mark@mblaw.org>]
Sent: Monday, May 23, 2016 12:21 PM
To: Rushing, James
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

James:

You're right. But this isn't Workers Compensation. Central Freight is NOT a subscriber to Texas Workers' Compensation.

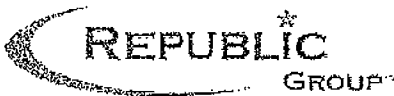
So, are you saying we don't have a deal?

Mark

From: Rushing, James [<mailto:James.Rushing@RepublicGroup.com>]
Sent: Monday, May 23, 2016 12:20 PM
To: Mark Cevallos
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

My supervisor stated in Texas Worker Comp is automatic lien.

James Rushing
Claims Representative
Republic Group
P.O. Box 809056
Dallas, TX 75380
Phone Number: 972-788-6788
Fax Number: 1-888-224-5874
James.Rushing@RepublicGroup.com



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From: Mark Cevallos [<mailto:Mark@mblaw.org>]
Sent: Monday, May 23, 2016 12:06 PM

To: Rushing, James
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

thanks

From: Rushing, James [mailto:James.Rushing@RepublicGroup.com]
Sent: Monday, May 23, 2016 12:05 PM
To: Mark Cevallos
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

Yes sir,

James Rushing
Claims Representative
Republic Group
P.O. Box 809056
Dallas, TX 75380
Phone Number: 972-788-6788
Fax Number: 1-888-224-5874
James.Rushing@RepublicGroup.com



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From: Mark Cevallos [mailto:Mark@mblaw.org]
Sent: Monday, May 23, 2016 11:59 AM
To: Rushing, James
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

James:

My office received a \$5,000 check for Med Pay. I'm assuming a separate check for \$35,000 is on the way?

Mark

From: Rushing, James [mailto:James.Rushing@RepublicGroup.com]
Sent: Thursday, May 19, 2016 2:49 PM
To: Mark Cevallos
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

ok

James Rushing
Claims Representative

Republic Group
P.O. Box 809056
Dallas, TX 75380
Phone Number: 972-788-6788
Fax Number: 1-888-224-5874
James.Rushing@RepublicGroup.com



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From: Mark Cevallos [<mailto:Mark@mblaw.org>]
Sent: Thursday, May 19, 2016 2:49 PM
To: Rushing, James
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

James:

I'll get this executed and back to you tomorrow.

Thanks,

Mark

From: Rushing, James [<mailto:James.Rushing@RepublicGroup.com>]
Sent: Thursday, May 19, 2016 2:29 PM
To: Mark Cevallos
Subject: CPP0802904 SMOKER'S OUTLET, INC

James Rushing
Claims Representative
Republic Group
P.O. Box 809056
Dallas, TX 75380
Phone Number: 972-788-6788
Fax Number: 1-888-224-5874
James.Rushing@RepublicGroup.com



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Mark Cevallos

From: Rushing, James <James.Rushing@RepublicGroup.com>
Sent: Friday, May 13, 2016 11:27 AM
To: Mark Cevallos
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

What's your Tax id number

James Rushing
Claims Representative
Republic Group
P.O. Box 809056
Dallas, TX 75380
Phone Number: 972-788-6788
Fax Number: 1-888-224-5874
James.Rushing@RepublicGroup.com



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From: Mark Cevallos [<mailto:Mark@mblaw.org>]
Sent: Friday, May 13, 2016 10:48 AM
To: Rushing, James
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

James:

Here's your indemnification letter. Let's get this settled for \$35,000 and get this file off both our desks.

Mark A. Cevallos
Miller & Bicklein

From: Rushing, James [<mailto:James.Rushing@RepublicGroup.com>]
Sent: Wednesday, April 20, 2016 3:22 PM
To: Mark Cevallos
Subject: CPP0802904 SMOKER'S OUTLET, INC

James Rushing
Claims Representative
Republic Group
P.O. Box 809056
Dallas, TX 75380

Phone Number: 972-788-6788

Fax Number: 1-888-224-5874

James.Rushing@RepublicGroup.com



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Mark Cevallos

From: Delia Diaz
Sent: Monday, May 9, 2016 10:54 AM
To: Mark Cevallos
Subject: william newborough

Please call James Rushing 800-344-2275 x 6788

Delia S. Diaz
Law Offices of Miller & Bicklein
8207 Callaghan Rd. # 250
San Antonio, Texas 78230

Ofc # - 210-366-2400
Fax # - 210-366-4791
E-mail – Delia@mblaw.org

Mark Cevallos

From: Rushing, James <James.Rushing@RepublicGroup.com>
Sent: Thursday, May 19, 2016 2:49 PM
To: Mark Cevallos
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

ok

James Rushing
Claims Representative
Republic Group
P.O. Box 809056
Dallas, TX 75380
Phone Number: 972-788-6788
Fax Number: 1-888-224-5874
James.Rushing@RepublicGroup.com



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From: Mark Cevallos [<mailto:Mark@mblaw.org>]
Sent: Thursday, May 19, 2016 2:49 PM
To: Rushing, James
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

James:

I'll get this executed and back to you tomorrow.

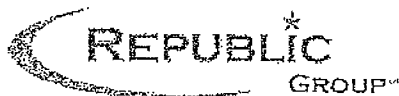
Thanks,

Mark

From: Rushing, James [<mailto:James.Rushing@RepublicGroup.com>]
Sent: Thursday, May 19, 2016 2:29 PM
To: Mark Cevallos
Subject: CPP0802904 SMOKER'S OUTLET, INC

James Rushing
Claims Representative
Republic Group
P.O. Box 809056

Dallas, TX 75380
Phone Number: 972-788-6788
Fax Number: 1-888-224-5874
James.Rushing@RepublicGroup.com



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Mark Cevallos

From: Rushing, James <James.Rushing@RepublicGroup.com>
Sent: Monday, May 23, 2016 12:05 PM
To: Mark Cevallos
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

Yes sir,

James Rushing
Claims Representative
Republic Group
P.O. Box 809066
Dallas, TX 75380
Phone Number: 972-788-6788
Fax Number: 1-888-224-5874
James.Rushing@RepublicGroup.com



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From: Mark Cevallos [<mailto:Mark@mblaw.org>]
Sent: Monday, May 23, 2016 11:59 AM
To: Rushing, James
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

James:

My office received a \$5,000 check for Med Pay. I'm assuming a separate check for \$35,000 is on the way?

Mark

From: Rushing, James [<mailto:James.Rushing@RepublicGroup.com>]
Sent: Thursday, May 19, 2016 2:49 PM
To: Mark Cevallos
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

ok

James Rushing
Claims Representative
Republic Group

P.O. Box 809056
Dallas, TX 75380
Phone Number: 972-788-6788
Fax Number: 1-888-224-5874
James.Rushing@RepublicGroup.com



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From: Mark Cevallos [<mailto:Mark@mblaw.org>]
Sent: Thursday, May 19, 2016 2:49 PM
To: Rushing, James
Subject: RE: CPP0802904 SMOKER'S OUTLET, INC

James:

I'll get this executed and back to you tomorrow.

Thanks,

Mark

From: Rushing, James [<mailto:James.Rushing@RepublicGroup.com>]
Sent: Thursday, May 19, 2016 2:29 PM
To: Mark Cevallos
Subject: CPP0802904 SMOKER'S OUTLET, INC

James Rushing
Claims Representative
Republic Group
P.O. Box 809056
Dallas, TX 75380
Phone Number: 972-788-6788
Fax Number: 1-888-224-5874
James.Rushing@RepublicGroup.com



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EXHIBIT 5

Anchor *Risk and Claims Management*
Texas Nonsubscription

P.O. Box 819045 Dallas, Texas 75381-9045 www.combinedgroup.com
14785 Preston Rd., Suite 350 Dallas, Texas 75254
214-295-1600 Fax 214-295-1700 800-275-3193 Fax 800-275-3194

May 13, 2016

James.rushing@republicgroup.com

Republic Group
P.O. Box 809056
Dallas, TX 75380

Our Insured: Central Freight Lines, Inc.
Our Claim # TPA1572107-William Newbrough
D/Loss: 06/23/15
Your Insured: Smoker's Outlet

Dear Mr. Rushing,

Mr. Newbrough was injured while in his course and scope of employment when he fell into a hole injuring his left arm. We are pursuing the medical and lost time costs associated with this injury.

We are the third party claims administrators for Central Freight Lines, Inc. and assist them in administering their Occupational Injury Benefit Plan.

Our current lien amount is \$52,881.79.

Please contact me directly at 214-295-1540, if you need any additional information.

Sincerely,

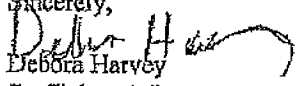

Debora Harvey
Sr. Claims Adjuster

EXHIBIT
D

Print Date: 05/13/2016

Detail Check Register

(Pyramid Claims System)

Page 1

<u>Check Number</u>	<u>Claim Number</u>	<u>Payee Name</u>	<u>Trans. Dat</u>	<u>From Date</u>	<u>To Date</u>	<u>Cov</u>	<u>Print Cat</u>	<u>Paid</u>
130735	TPA1572107-001	WILLIAM H NEWBROUGH	07/02/2015	06/23/2015	06/27/2015	WKDIS	30	469.20
Check Total:								469.20
130932	TPA1572107-001	WILLIAM H NEWBROUGH	07/16/2015	06/28/2015	07/11/2015	WKDIS	30	1,094.80
Check Total:								1,094.80
131462	TPA1572107-001	WILLIAM H NEWBROUGH	08/13/2015	07/26/2015	08/08/2015	WKDIS	30	1,564.00
131462	TPA1572107-001	WILLIAM H NEWBROUGH	08/13/2015	07/12/2015	07/25/2015	WKDIS	30	625.60
Check Total:								2,189.60
132033	TPA1572107-001	WILLIAM H NEWBROUGH	09/04/2015	08/09/2015	08/26/2015	WKDIS	30	1,564.00
Check Total:								1,564.00
132242	TPA1572107-001	WILLIAM H NEWBROUGH	09/18/2015	08/23/2015	09/05/2015	WKDIS	30	1,564.00
Check Total:								1,564.00
132622	TPA1572107-001	WILLIAM H NEWBROUGH	10/01/2015	09/06/2015	09/19/2015	WKDIS	30	1,564.00
Check Total:								1,564.00
132873	TPA1572107-001	WILLIAM H NEWBROUGH	10/15/2015	09/20/2015	10/03/2015	WKDIS	30	1,564.00
Check Total:								1,564.00
133313	TPA1572107-001	WILLIAM H NEWBROUGH	11/05/2015	10/04/2015	10/17/2015	WKDIS	30	1,564.00
133313	TPA1572107-001	WILLIAM H NEWBROUGH	11/05/2015	10/18/2015	10/31/2015	WKDIS	30	1,564.00
Check Total:								3,128.00
133758	TPA1572107-001	WILLIAM H NEWBROUGH	11/24/2015	11/01/2015	11/14/2015	WKDIS	30	1,564.00
Check Total:								1,564.00
133909	TPA1572107-001	WILLIAM H NEWBROUGH	12/07/2015	11/15/2015	11/28/2015	WKDIS	30	1,564.00
Check Total:								1,564.00
134362	TPA1572107-001	WILLIAM H NEWBROUGH	12/29/2015	11/29/2015	12/12/2015	WKDIS	30	469.20
Check Total:								469.20
Total for Coverage WKDIS								16,734.80
13796	TPA1572107-001	[REDACTED] MD PA	07/16/2015	06/23/2015	06/23/2015	ACCMED	21	187.86
Check Total:								187.86
13797	TPA1572107-001	[REDACTED]	07/16/2015	06/25/2015	06/25/2015	ACCMED	23	114.20

CLM Detail Check Register

Print Date: 05/13/2016

Detail Check Register (Pyramid Claims System)

Page 2

Check Number	Claim Number	Payee Name	Trans. Dat	From Date	To Date	Cov	Prnt Chk	Paid
13797	TPA1572107-001	[REDACTED]	07/16/2015	06/29/2015	06/30/2015	ACCMED	23	472.54
Check Total:								586.83
13820	TPA1572107-001	ANCHOR CLAIMS MANAGEM	07/28/2015	06/23/2015	06/23/2015	ACCMED	10	47.60
13820	TPA1572107-001	ANCHOR CLAIMS MANAGEM	07/28/2015	06/25/2015	06/25/2015	ACCMED	10	2.33
13820	TPA1572107-001	ANCHOR CLAIMS MANAGEM	07/28/2015	06/29/2015	06/30/2015	ACCMED	10	5.08
Check Total:								55.01
13824	TPA1572107-001	[REDACTED]	07/28/2015	06/23/2015	06/23/2015	ACCMED	24	146.15
Check Total:								146.15
13832	TPA1572107-001	[REDACTED] MD PA	07/30/2015	07/07/2015	07/07/2015	ACCMED	21	66.51
Check Total:								66.51
13844	TPA1572107-001	[REDACTED]	08/03/2015	07/01/2015	07/02/2015	ACCMED	23	472.54
Check Total:								472.54
13870	TPA1572107-001	[REDACTED] MD PA	08/24/2015	07/20/2015	07/20/2015	ACCMED	21	66.51
13870	TPA1572107-001	[REDACTED] MD PA	08/24/2015	08/04/2015	08/04/2015	ACCMED	21	81.51
Check Total:								148.02
13881	TPA1572107-001	ANCHOR CLAIMS MANAGEM	08/26/2015	07/20/2015	07/20/2015	ACCMED	10	20.73
13881	TPA1572107-001	ANCHOR CLAIMS MANAGEM	08/26/2015	07/01/2015	07/02/2015	ACCMED	10	5.08
13881	TPA1572107-001	ANCHOR CLAIMS MANAGEM	08/26/2015	07/07/2015	07/07/2015	ACCMED	10	20.73
13881	TPA1572107-001	ANCHOR CLAIMS MANAGEM	08/26/2015	08/04/2015	08/04/2015	ACCMED	10	25.06
Check Total:								71.60
13882	TPA1572107-001	ANCHOR CLAIMS MANAGEM	08/26/2015	07/24/2015	07/24/2015	ACCMED	10	7.55
13882	TPA1572107-001	ANCHOR CLAIMS MANAGEM	08/26/2015	07/30/2015	07/30/2015	ACCMED	10	283.00
Check Total:								290.55
13892	TPA1572107-001	[REDACTED]	08/26/2015	07/30/2015	07/30/2015	ACCMED	20	294.85
Check Total:								294.85
13908	TPA1572107-001	[REDACTED]	09/01/2015	07/06/2015	07/07/2015	ACCMED	22	472.62
Check Total:								472.62
13926	TPA1572107-001	[REDACTED]	09/15/2015	08/19/2015	08/19/2015	ACCMED	21	286.06
Check Total:								286.06
13947	TPA1572107-001	[REDACTED]	09/24/2015	08/26/2015	08/26/2015	ACCMED	21	124.51

CLM Detail Check Register

Print Date: 05/13/2016

Detail Check Register

(Pyramid Claims System)

Page 3

<u>Check Number</u>	<u>Claim Number</u>	<u>Payer Name</u>	<u>Trans Date</u>	<u>From Date</u>	<u>To Date</u>	<u>Cnt</u>	<u>Pmt Cnt</u>	<u>Paid</u>
Check Total:								124.51
13950	TPA1572107-001	ANCHOR CLAIMS MANAGEM	09/25/2015	09/03/2015	09/03/2015	ACCMED	10	1.19
13950	TPA1572107-001	ANCHOR CLAIMS MANAGEM	09/25/2015	08/26/2015	08/26/2015	ACCMED	10	3.36
Check Total:								4.55
13951	TPA1572107-001	ANCHOR CLAIMS MANAGEM	09/25/2015	08/19/2015	08/19/2015	ACCMED	10	26.40
13951	TPA1572107-001	ANCHOR CLAIMS MANAGEM	09/25/2015	07/06/2015	07/07/2015	ACCMED	10	5.07
Check Total:								31.47
13962	TPA1572107-001	[REDACTED]	09/25/2015	09/03/2015	09/03/2015	ACCMED	21	109.51
Check Total:								109.51
14002	TPA1572107-001	[REDACTED]	10/16/2015	09/21/2015	09/21/2015	ACCMED	21	15.00
Check Total:								15.00
14011	TPA1572107-001	[REDACTED]	10/23/2015	09/08/2015	09/08/2015	ACCMED	22	485.79
Check Total:								485.79
14017	TPA1572107-001	[REDACTED]	10/26/2015	09/15/2015	09/15/2015	ACCMED	23	147.77
14017	TPA1572107-001	[REDACTED]	10/26/2015	09/10/2015	09/10/2015	ACCMED	23	150.20
14017	TPA1572107-001	[REDACTED]	10/26/2015	09/29/2015	09/29/2015	ACCMED	23	147.77
14017	TPA1572107-001	[REDACTED]	10/26/2015	09/24/2015	09/24/2015	ACCMED	23	147.77
14017	TPA1572107-001	[REDACTED]	10/26/2015	09/21/2015	09/21/2015	ACCMED	23	147.77
14017	TPA1572107-001	[REDACTED]	10/26/2015	09/17/2015	09/17/2015	ACCMED	23	147.77
Check Total:								889.05
14027	TPA1572107-001	ANCHOR CLAIMS MANAGEM	10/27/2015	09/08/2015	09/08/2015	ACCMED	10	1,226.52
14027	TPA1572107-001	ANCHOR CLAIMS MANAGEM	10/27/2015	09/21/2015	09/21/2015	ACCMED	10	21.55
14027	TPA1572107-001	ANCHOR CLAIMS MANAGEM	10/27/2015	09/21/2015	09/21/2015	ACCMED	10	2.17
Check Total:								1,250.24
14033	TPA1572107-001	ANCHOR CLAIMS MANAGEM	10/27/2015	09/17/2015	09/17/2015	ACCMED	10	21.55
14033	TPA1572107-001	ANCHOR CLAIMS MANAGEM	10/27/2015	09/24/2015	09/24/2015	ACCMED	10	21.55
14033	TPA1572107-001	ANCHOR CLAIMS MANAGEM	10/27/2015	09/29/2015	09/29/2015	ACCMED	10	21.55
14033	TPA1572107-001	ANCHOR CLAIMS MANAGEM	10/27/2015	09/15/2015	09/15/2015	ACCMED	10	21.55
14033	TPA1572107-001	ANCHOR CLAIMS MANAGEM	10/27/2015	09/10/2015	09/10/2015	ACCMED	10	21.07
Check Total:								107.27
14051	TPA1572107-001	[REDACTED]	11/02/2015	09/14/2015	09/14/2015	ACCMED	22	63.92
Check Total:								63.92

CLM Detail Check Register

Print Date: 05/13/2016

Detail Check Register (Pyramid Claims System)

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Check Number	Claim Number	Payee Name	Trans. Date	From Date	To Date	Cov	Part Cont	Paid
14054	TPA1572107-001	[REDACTED] MED CTR	11/03/2015	09/08/2015	09/08/2015	ACCMED	22	19,628.65
Check Total:								19,628.65
14074	TPA1572107-001	[REDACTED] MD PA	11/10/2015	08/31/2015	08/31/2015	ACCMED	21	243.51
Check Total:								243.51
14086	TPA1572107-001	[REDACTED]	11/16/2015	10/20/2015	10/20/2015	ACCMED	23	151.06
14086	TPA1572107-001		11/16/2015	10/15/2015	10/15/2015	ACCMED	23	191.84
14086	TPA1572107-001		11/16/2015	10/13/2015	10/13/2015	ACCMED	23	191.84
14086	TPA1572107-001		11/16/2015	10/06/2015	10/06/2015	ACCMED	23	145.40
14086	TPA1572107-001		11/16/2015	10/01/2015	10/01/2015	ACCMED	23	147.77
14086	TPA1572107-001		11/16/2015	10/08/2015	10/08/2015	ACCMED	23	147.77
Check Total:								975.68
14092	TPA1572107-001	[REDACTED]	11/17/2015	10/19/2015	10/19/2015	ACCMED	21	15.00
Check Total:								15.00
14102	TPA1572107-001	[REDACTED]	11/19/2015	09/08/2015	09/08/2015	ACCMED	22	3,571.96
Check Total:								3,571.96
14111	TPA1572107-001	ANCHOR CLAIMS MANAGEM	11/23/2015	10/15/2015	10/15/2015	ACCMED	10	27.53
14111	TPA1572107-001	ANCHOR CLAIMS MANAGEM	11/23/2015	10/20/2015	10/20/2015	ACCMED	10	21.55
14111	TPA1572107-001	ANCHOR CLAIMS MANAGEM	11/23/2015	08/31/2015	08/31/2015	ACCMED	10	80.48
Check Total:								129.56
14116	TPA1572107-001	ANCHOR CLAIMS MANAGEM	11/23/2015	10/19/2015	10/19/2015	ACCMED	10	2.17
14116	TPA1572107-001	ANCHOR CLAIMS MANAGEM	11/23/2015	10/06/2015	10/06/2015	ACCMED	10	16.82
14116	TPA1572107-001	ANCHOR CLAIMS MANAGEM	11/23/2015	10/08/2015	10/08/2015	ACCMED	10	21.55
14116	TPA1572107-001	ANCHOR CLAIMS MANAGEM	11/23/2015	10/13/2015	10/13/2015	ACCMED	10	27.53
14116	TPA1572107-001	ANCHOR CLAIMS MANAGEM	11/23/2015	10/01/2015	10/01/2015	ACCMED	10	21.55
Check Total:								89.62
14117	TPA1572107-001	ANCHOR CLAIMS MANAGEM	11/23/2015	09/08/2015	09/08/2015	ACCMED	10	2,539.98
14117	TPA1572107-001	ANCHOR CLAIMS MANAGEM	11/23/2015	09/08/2015	09/08/2015	ACCMED	10	649.29
Check Total:								3,189.27
14126	TPA1572107-001	[REDACTED]	11/25/2015	10/22/2015	10/22/2015	ACCMED	23	217.07
Check Total:								217.07
14133	TPA1572107-001	[REDACTED]	11/30/2015	09/22/2015	09/22/2015	ACCMED	22	43.95
Check Total:								43.95

C:\M\Detail\Check Register

Print Date: 05/13/2016

Detail Check Register

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(Pyramid Claims System)

<u>Check Number</u>	<u>Claim Number</u>	<u>Payee Name</u>	<u>Trans. Dat</u>	<u>From Date</u>	<u>To Date</u>	<u>Cov</u>	<u>Print Cat</u>	<u>Paid</u>
14141	TPA1572107-001	[REDACTED]	12/07/2015	11/17/2015	11/17/2015	ACCMED	23	213.78
Check Total:								213.78
14148	TPA1572107-001	[REDACTED]	12/08/2015	11/19/2015	11/19/2015	ACCMED	23	213.78
Check Total:								213.78
14156	TPA1572107-001	[REDACTED]	12/11/2015	09/08/2015	09/08/2015	ACCMED	21	783.99
Check Total:								783.99
14174	TPA1572107-001	[REDACTED]	12/21/2015	11/24/2015	11/24/2015	ACCMED	23	213.78
Check Total:								213.78
14184	TPA1572107-001	ANCHOR CLAIMS MANAGEM	12/23/2015	11/19/2015	11/19/2015	ACCMED	10	29.88
14184	TPA1572107-001	ANCHOR CLAIMS MANAGEM	12/23/2015	11/17/2015	11/17/2015	ACCMED	10	29.88
14184	TPA1572107-001	ANCHOR CLAIMS MANAGEM	12/23/2015	09/08/2015	09/08/2015	ACCMED	10	55.82
Check Total:								115.58
14191	TPA1572107-001	ANCHOR CLAIMS MANAGEM	12/23/2015	10/22/2015	10/22/2015	ACCMED	10	29.89
14191	TPA1572107-001	ANCHOR CLAIMS MANAGEM	12/23/2015	11/24/2015	11/24/2015	ACCMED	10	29.88
Check Total:								59.77
14205	TPA1572107-001	[REDACTED]	12/31/2015	11/10/2015	11/10/2015	ACCMED	22	43.95
Check Total:								43.95
14398	TPA1572107-001	[REDACTED]	03/24/2016	03/07/2016	03/07/2016	ACCMED	21	111.18
Check Total:								111.18
14404	TPA1572107-001	ANCHOR CLAIMS MANAGEM	03/28/2016	03/07/2016	03/07/2016	ACCMED	10	.82
Check Total:								.82
14492	TPA1572107-001	[REDACTED]	04/28/2016	04/18/2016	04/18/2016	ACCMED	21	126.18
Check Total:								126.18
Total for Coverage							ACCMED	35,146.99
Grand Total for Claim Number							TPA1572107	52,881.79

CMA Detail Check Register

EXHIBIT 6

FRAUD AND NEGLIGENT MISREPRESENTATION

PJC 105.4

PJC 105.4 Instruction on Common-Law Fraud—Failure to Disclose When There Is Duty to Disclose

Fraud occurs when—

1. a party fails to disclose a material fact within the knowledge of that party, and
2. the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth, and
3. the party intends to induce the other party to take some action by failing to disclose the fact, and
4. the other party suffers injury as a result of acting without knowledge of the undisclosed fact.

COMMENT

When to use. PJC 105.4 should accompany PJC 105.1 if the court finds that there is a duty to disclose.

Source of instruction. PJC 105.4 is based on the elements of fraud by nondisclosure set forth in *Bradford v. Vento*, 48 S.W.3d 749, 754–55 (Tex. 2001). *See also New Process Steel Corp. v. Steel Corp. of Texas*, 703 S.W.2d 209, 214 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) (court's charge adequately instructed jury on fraud, including nondisclosure). Instruction 4 submits the reliance element of fraud. *See Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171, 181–82 (Tex. 1997); *Custom Leasing, Inc. v. Texas Bank & Trust Co.*, 516 S.W.2d 138, 143 (Tex. 1974).

Inducing inaction. If the evidence shows an intent to induce inaction, elements 3 and 4 may be appropriately modified. *See, e.g., Horizon Shipbuilding, Inc. v. Blyn II Holding, LLC*, 324 S.W.3d 840, 850 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (“[B]y failing to disclose the facts, the defendant intended to induce the plaintiff to take some action or refrain from acting . . .”) (emphasis added); *Blankinship v. Brown*, 399 S.W.3d 303, 308 (Tex. App.—Dallas 2013, pet. denied) (same).

Silence as misrepresentation. “As a general rule, a failure to disclose information does not constitute fraud unless there is a duty to disclose the information.” *Bradford*, 48 S.W.3d at 755. “Whether such a duty exists is a question of law.” *Bradford*, 48 S.W.3d at 755. The supreme court has concluded that a duty to disclose arises when there is a confidential or fiduciary relationship. *Insurance Co. of North America v. Morris*, 981 S.W.2d 667, 674–75 (Tex. 1998). The court has also held that a duty to disclose arises in other circumstances. *See Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986) (specific representations about bonus plan gave rise to

PJC 105.4

FRAUD AND NEGLIGENT MISREPRESENTATION

duty to disclose adoption of an alternate plan); *Smith v. National Resort Communities, Inc.*, 585 S.W.2d 655, 658 (Tex. 1979) (seller of real estate has duty to disclose material facts not reasonably discoverable by purchaser).

Courts of appeals have concluded that a duty to disclose may arise when (1) there is a special or fiduciary relationship, (2) a person voluntarily discloses partial information but fails to disclose the whole truth, (3) a person makes a representation but fails to disclose new information that makes the earlier representation misleading or untrue, or (4) a person makes a partial disclosure and conveys a false impression. *See, e.g., Columbia/HCA Healthcare Corp. v. Cotney*, 72 S.W.3d 735, 744–45 (Tex. App.—Waco 2002, no pet.); *Anderson, Greenwood & Co. v. Martin*, 44 S.W.3d 200, 212–13 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Lesikar v. Rapoport*, 33 S.W.3d 282, 299 (Tex. App.—Texarkana 2000, pet. denied); *Hoggett v. Brown*, 971 S.W.2d 472, 487 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).

Section 551 of the *Restatement (Second) of Torts* (1977) recognizes a general duty to disclose facts in a commercial setting. In *Bradford*, however, the supreme court stated “[w]e have never adopted section 551.” *Bradford*, 48 S.W.3d at 756; *see also SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 352 (Tex. 1995).

Rescission. If rescission is sought, the intent requirement may be lessened. *See Calloway v. Manion*, 572 F.2d 1033, 1039 (5th Cir. 1978); *Chase, Inc. v. Bostick*, 551 S.W.2d 116, 119 (Tex. Civ. App.—Tyler 1977, writ ref’d n.r.c.). Mere failure to disclose material information may give rise to rescission. *Smith*, 585 S.W.2d at 658.

Concealment. Active concealment of material facts may also be as actionable as false statements. *Campbell v. Booth*, 526 S.W.2d 167, 172 (Tex. Civ. App.—Dallas 1975, writ ref’d n.r.e.). PJC 105.4 element 1 may need to be modified to include concealment. *See GXG, Inc. v. Texaco Oil & Gas*, 977 S.W.2d 403, 409 (Tex. App.—Corpus Christi 1998, pet. denied).

EXHIBIT 7

CIVIL CONSPIRACY

PJC 109.1

PJC 109.1 Question and Instruction on Conspiracy

QUESTION _____

[Conditioned on findings of a statutory violation or a tort (other than negligence) that proximately caused damages.]

Was *Connie Conspirator* part of a conspiracy that damaged *Paul Payne*?

To be part of a conspiracy, *Connie Conspirator* and another person or persons must have had knowledge of, agreed to, and intended a common objective or course of action that resulted in the damages to *Paul Payne*. One or more persons involved in the conspiracy must have performed some act or acts to further the conspiracy.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 109.1 submits the question of conspiracy to accomplish the unlawful objective of harming another by committing a statutory violation or a tort (other than negligence). See comment below, "Conspiracy to accomplish lawful objective by unlawful means," for the situation involving a conspiracy to employ an unlawful means to accomplish a lawful objective. Civil conspiracy to unlawfully harm another is a derivative tort. Liability must be dependent on participation in some underlying statutory violation or a tort (other than negligence). *Chu v. Hong*, 249 S.W.3d 441, 444 n.4 (Tex. 2008). It is a means for imposing joint and several liability on persons in addition to the actual perpetrator(s) of the underlying tort.

Source of question and instruction. A civil conspiracy is "a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." *Firestone Steel Products Co. v. Barajas*, 927 S.W.2d 608, 614 (Tex. 1996). The elements of civil conspiracy have been stated as "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result." *Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005); *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996); see also *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 719-20 (Tex. 1995); *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 856 (Tex. 1968).

Knowledge, intent, and agreement. To be liable for conspiracy, a party must be shown to have intended to do more than engage in the conduct that resulted in the

PJC 109.1

CIVIL CONSPIRACY

injury. It must be shown that from the inception of the combination or agreement the party intended to cause the injury or was aware of the harm likely to result from the wrongful conduct. *Triplex Communications, Inc.*, 900 S.W.2d at 720; *Great National Life Insurance Co. v. Chapa*, 377 S.W.2d 632, 635 (Tex. 1964). Thus, a party must be shown to have known the object and purpose of the conspiracy and to have had a meeting of the minds with the other conspirators to accomplish that object and purpose, intending to bring about the resulting injury. *Nortex Oil & Gas Corp.*, 435 S.W.2d at 857.

Unlawful act. A defendant's liability for conspiracy is based on participation in the statutory violation or underlying tort (other than negligence) that would have been actionable against at least one of the conspirators individually. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996); *International Bankers Life Insurance Co. v. Holloway*, 368 S.W.2d 567, 581 (Tex. 1963). An act or declaration by a conspirator not in pursuance of the common objective is not actionable against coconspirators. *Chapa*, 377 S.W.2d at 635. Likewise, an improper motive in performing a lawful action will not support liability for conspiracy. *Kingsbery v. Phillips Petroleum Co.*, 315 S.W.2d 561, 576 (Tex. Civ. App.—Austin 1958, writ ref'd n.r.e.). The injury must have been caused by the tort or statutory violation that the conspirator agreed with the perpetrator to bring about while intending the resulting harm. *Triplex Communications, Inc.*, 900 S.W.2d at 720; *Nortex Oil & Gas Corp.*, 435 S.W.2d at 857. Once a civil conspiracy is found, each coconspirator is responsible for the actions of any coconspirator in furtherance of the conspiracy. Thus, each element of the underlying tort or violation is imputed to each participant. *Akin v. Dahl*, 661 S.W.2d 917, 921 (Tex. 1983).

Conspiracy to accomplish lawful objective by unlawful means. PJC 109.1 submits the proper question if a court or jury has established the existence of an unlawful objective, that is, a statutory violation or a tort (other than negligence). The supreme court's opinions regarding conspiracy also define a conspiracy cause of action arising when the conspirators pursue a lawful objective by unlawful means. *Triplex Communications, Inc.*, 900 S.W.2d at 719–20; *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983); *Chapa*, 377 S.W.2d at 635; *Berry v. Golden Light Coffee Co.*, 327 S.W.2d 436, 438 (Tex. 1959); *State v. Standard Oil Co.*, 107 S.W.2d 550, 559 (Tex. 1937). The Committee believes PJC 109.1 can be used to submit either theory but that it may need modification in some instances depending on the facts of the case.

Liability. The damages recoverable in an action for civil conspiracy are those damages resulting from the commission of the wrong, not the conspiratorial agreement. *Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922, 925 (Tex. 1979); see also *Triplex Communications, Inc.*, 900 S.W.2d at 720. Therefore, the Committee recommends that PJC 109.1 be submitted after, and conditioned on, an affirmative finding of damages caused by the statutory violation or underlying tort (other than negligence). In those instances in which the evidence suggests that divisible damages arose from multiple underlying torts only some of which were the subject of the conspiracy, the

CIVIL CONSPIRACY

PJC 109.1

court should consider obtaining findings to determine which underlying statutory violations or torts were the subject of the conspiracy and the damages and submitting a separate issue on damages caused by those underlying violations or torts. *See THPD, Inc. v. Continental Imports, Inc.*, 260 S.W.3d 593, 604–05 (Tex. App.—Austin 2008, no pet.).

Exemplary damages. An affirmative finding on an underlying cause of action that includes a finding sufficient to impose exemplary damages may be imputed to all participants in the conspiracy on an affirmative conspiracy finding. *Akin*, 661 S.W.2d at 921. For questions submitting exemplary damages, see PJC 115.37 and 115.38 and the Comments accompanying those questions.